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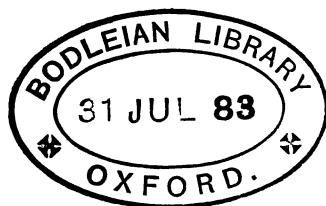
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PREFACE.

HAD it not been for the very recent appearance of another work upon the same subject, the author would not have considered any apology necessary for the appearance of a work upon a subject, the doctrines of which have recently been so much elucidated, and the practice in which has been so greatly altered, as that of Discovery. In his opinion, of the justice of which the public must judge, there is nothing in that previous work to render his own unnecessary. It was originally intended, and was so announced, to postpone the publication of the present work until the issue of the expected new rules of practice, which would, it was understood, deal at any rate with the costs of discovery, and otherwise place some check upon the free flow of interrogatories with all their train of innumerable applications and costs. This intention was of necessity abandoned in consequence of the apparently indefinite postponement of the further consideration of the Rules. One word as to the special object of the book. The author has attempted to deal with the subject somewhat more systematically than has hitherto been done, and to

present a short statement of the law under the various heads, rather than to give a string of cases, which proceed in great measure upon their individual facts. In this respect he trusts that he has not incurred the fault of obscurity, while aiming at conciseness. Care has been taken to collect as many authorities as possible, and with that object, the decisions of the Irish Courts, which are now *in pari materia*, so far as the practice is concerned, have been largely cited. Lastly, it is hoped that the table of multiple references to the reports will be found useful, especially by those whose libraries are limited in this respect.

C. J. PEILE.

LAMB BUILDING, *June*, 1883.

P.S.—Acknowledgment is due to the editors of Chitty's Forms and Daniell's Chancery Forms, for valuable assistance derived therefrom in compiling the forms given in the Appendix.

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ADDENDA.

THE following cases upon discovery, which have been Addenda.
decided since this work first went to press, and are, consequently, only briefly referred to therein, are inserted here at greater length on account of their importance.

Lyell v. Kennedy (a) was in substance an action for the recovery of land by the assignee of alleged co-heiresses-at-law against a person in possession of the estates sought to be recovered, and with the object of avoiding the effect of the Statute of Limitations, it was alleged that the defendant's possession was that of a trustee of the property for the alleged co-heiresses and their assigns. The plaintiff delivered interrogatories, which to a great extent were directed to obtaining information in support of the pedigree of the alleged co-heiresses, some of which the defendant declined to answer upon various grounds (aa). Bacon, V.-C., refused to order him to make any further answer, and the Court of Appeal, upon grounds of "public policy," and the supposed authority of the case of *Horton v. Bott* (b), decided by the Court of Exchequer in 1857, no cases being cited to them in which bills of discovery had been allowed in aid of actions of ejectment, not only affirmed his decision, but laid it down that (1) a plaintiff in such an action must recover solely by the strength of his own title, and consequently, was not entitled to interrogate the defendant *at all*, and (2) the right to discovery was unaffected by the Judicature Acts; at the same time, also affirming the decision of Bacon, V.-C., they refused an application by the plaintiff for inspection of documents disclosed by the defendant's affidavit, which were described as relating solely to the defence of his title to the property in question in the action, and as being communications between himself and his solicitors, their London agents, and his counsel in reference to the defence of his title, and prepared or procured for the purposes of and in contemplation of such defence (c).

(a) 20 Ch. D. 484 ; 8 App. Cas. 217 (H. L.).

(aa) See the report in the H. L. (52 L. J. Ch. 385).

(b) 2 H. & N. 249. The interrogatories disallowed in this case were as to the defendant's pedigree.

(c) *Ib.* 491.

Addenda.

The House of Lords (*d*), upon the authority of the numerous cases cited before them, in which bills of discovery had been allowed in support of actions of ejectment (*e*), none of which, as above remarked, had been cited before the Court below, reversed this decision, holding that there was no distinction as regards the right to discovery between actions of ejectment and other actions, and ordered the interrogatories to be answered in substance, subject to any privilege against particular discovery which the defendant might be entitled to claim. Leave was also given him to file a further affidavit in support of the privilege claimed by him for the documents, his previous affidavit being held insufficient, apparently on the ground that the description of the documents as appearing in the schedule was inconsistent with the claim of privilege (*f*).

Upon the second point, the Lord Chancellor expressed his assent with the doctrine of the Court of Appeal, that the right to discovery had not been enlarged by the Judicature Act (*g*), but, with the exception of Lord Fitzgerald, who expressed considerable doubt upon the subject (*h*), the point was not noticed in any of the other judgments. Lords Bramwell and Fitzgerald also forcibly pointed out that the rule that the plaintiff must recover on the strength of his own title applied to all actions, or at least to all actions to recover property in the possession of the defendant, and that there was nothing in public policy to deprive the plaintiff of his ordinary right of proving his own title by the lips of the defendant (*i*). In the meanwhile, in accordance with the decisions of the Court of Appeal, Chitty, J., in *Ford v. Daniell* (*k*), refused to order an affidavit of documents from the defendant in a similar action, expressly dissenting from the decision of the Common Pleas Division in *New British Co. v. Peed* (*l*), and his decision was affirmed by the Court of Appeal (*m*). Before the order in the latter case, however, was drawn up, the House of Lords had reversed the decision in *Lyell v. Kennedy*, and the Court of Appeal, accordingly, reversed their previous decision and allowed the appeal (*n*).

Ford v. Daniell,
decided by
C. A. accordingly.

Hunnings v. Williamson.
Common in-
former not
entitled to
discovery.

The doctrine that the right to discovery is unaffected by the Judicature Acts has also been recognised in the recent case of *Hunnings* (or *Hemmings*) *v. Williamson* (*o*), where it was held that the plaintiff in an action for penalties alone is not entitled to an affidavit of documents from, or to interrogate, the defendant, on the ground that a Court of Equity would not have given discovery

(*d*) 52 L. J. Ch. 385 ; 8 App. Cas. 217.

(*e*) *V. ib.* 387, 391.

(*f*) See *per* Lord Selborne, L. C., *ib.* 392.

(*g*) *Ib.* 390.

(*h*) *Ib.* 395.

(*i*) *Ib.* 393-5.

(*k*) 47 L. T. 575.

(*l*) 3 C. P. D. 196.

(*m*) L. J. (N. C.) 22.

(*n*) W. N. 1883, 27, 52.

(*o*) 10 Q. B. D. 459, 462.

in a suit, where the whole object was to convict the defendant in a penalty (*p*). The effect of these decisions is, as pointed out by Stephen, J., in the case last cited, to add to the word "interrogatories" in Order XXXI, r. 1, the words "such as would have been allowed in the Court of Chancery" (*q*), and that when the whole object of the action is to obtain a penalty, no interrogatories are allowed; but in other cases, where there is some other object allowing of interrogatories being administered (as in *Fisher v. Owen* (*r*)), the person interrogated cannot refuse to answer (*s*). Addenda.

In *Kennedy v. Lyell* (*t*), which was a cross action between the same parties as the ejectment action of *Lyell v. Kennedy*, in which the former defendant sought to recover penalties from the former plaintiff, under the Statute 32 Hen. 8, c. 9, for buying a pretended title, the defendant in support of his defence, administered to the plaintiff very lengthy and minute interrogatories, characterised by Baggallay, L. J., as oppressive (*u*), with the object of proving the pedigree of the persons from whom his title was derived; asking not mere simple facts, such as the fact or date of the death of particular persons, but questions involving a considerable amount of almost legal inference as regarded the degrees of relationship of the several parties referred to (*x*), such as whether particular persons were not the last of their race, and if not, who else was then living, whether So-and-so were co-heiresses, &c. Information procured for purposes of the litigation.
Distinction between confidential communications and matters of fact.

To some of these interrogatories, the plaintiff by his further answer, as to the sufficiency of which the question arose, declined to answer on the ground that he had no personal knowledge of the matters inquired into, and that such information as he had received in respect of the said matters had been derived by him from information procured by his solicitors, or their agents, in and for the purpose of defending his title to the hereditaments claimed in the original action. The question was first argued before Jessel, M. R., and Lindley, L. J., who, without deciding it, expressed opinions in favour of the privilege (*y*), and finally came before a fresh Court composed of Baggallay and Cotton, LL. JJ., who also held the answer sufficient. Upon the second argument, it was not disputed that if written or verbal reports had been made to the solicitor, or by the solicitor to the plaintiff, of the results of those inquiries, those reports themselves would have been privileged (*z*), but it was contended that the privilege did not extend to *facts* included in or learned from such reports, and a number of cases were cited, the

(*p*) See *Chadwick v. C.*, 22 L. J. Ch. 329.

(*q*) 52 L. J. Q. B. 276. In *Lyell v. Kennedy*, H. L. (52 L. J. Ch. 385), Lord Fitzgerald expressed an opinion, that since the Judicature Acts, discovery could be enforced in such a case (*ib.* 395).

(*r*) 8 Ch. D. 645. This distinction can hardly be considered satisfactory.

(*s*) *Ib.*

(*t*) 48 L. T. 255.

(*u*) *V. ib.* 458.

(*x*) See *per* Baggallay, L. J., *ib.* 458; *per* Cotton, L. J., *ib.* 462.

(*y*) *Ib.* 456 (*a*).

(*z*) See *Churton v. Frewen*, 2 Dr. & Sm. 390; *Walsham v. Stain'on*, 2 H. & M. 1.

Addenda. most material of which will be found in the judgment of Cotton, L. J., cited below. Baggallay, L. J., after intimating his inclination to agree with the distinction contended for by the defendant if the interrogatories had been confined to simple matters of fact, dwelt upon the complex and oppressive nature of the interrogatories put, and finally treated the case as coming within the privilege attaching to evidence obtained by the solicitor after litigation, citing and approving of that portion of the judgment of Jessel, M. R., in *Wheeler v. Le Marchant* (a), which deals with that class of privilege.

Cotton, L. J., after distinguishing the cases principally relied on by the appellant (b), as either proceeding upon the principle that no communication made to a solicitor by his opponent can be confidential, such as *Spencely v. Schulenburg* (7 East, 357), *Desborough v. Rawlins* (3 Myl. & Cr. 515), *Gore v. Bowser*, (5 De G. & Sm. 30), *Baker v. L. & S. W. R.* (L. R. 3 Q. B. 91), and *Ford v. Tennant* (32 Beav. 162) (c), or as being cases where the information sought was as to facts patent to the senses, as in *Brown v. Foster* (1 H. & N. 736), and *Sawyer v. Birchmore* (3 Myl. & K. 572), including things heard with the ears, said (d) : "Of course, the information received by the solicitor is in one sense a fact heard by the ears at the time, but the question is whether he (*i.e.*, the client) is bound to communicate the result of the inquiries made by the solicitor if communicated to him in that way. The privilege is in consequence of the employment of the solicitor in this confidential way in order to obtain materials for the defence. If the client is told of that, it is protected and privileged, if it is not merely the statement of a fact known and patent to the senses, but is that which is the result of the solicitor's mind working upon and acting as professional adviser with reference to facts which he has seen." Then, after pointing out that the questions in the present case were questions, "*not of facts patent to the senses, but of the probable results of and inferences from other facts* which would be patent to the senses, seen by the eyes or heard by the ears" (dd), he concluded by saying: "Having regard to the necessarily privileged way in which the solicitor was employed on behalf of his client for the purpose of protecting his interest and obtaining evidence, either for his attack or for his defence against the attack upon him, in my opinion the plaintiff is not bound to disclose any information given him by his solicitor as to inferences which he draws, or as to the effect on his mind of what he has seen or heard, any more than he would be to produce, as a whole, necessarily confidential reports made to him, either in writing or verbally, as to the result as a whole of the inquiries which he has made." (e) The case therefore in no way trenches upon the privilege attached to confidential

(a) 17 Ch. D. 675, 682.

(b) *Ib.* 461-2.

(c) See also *Perry v. Smith*, 9 M. & W. 681; *Weeks v. Argent*, 16 ib. 817.

(d) *Ib.* 462.

(dd) *Ib.*

(e) *Ib.*

communications between solicitor and client, or to "materials for the brief," but recognises, and apparently approves, the distinction between matters of confidence and *matters of fact*, communicated between solicitor and client, provided the disclosure sought is confined to such matters of fact alone, and not extended to the construction which may have been put upon or the inference drawn by the solicitor from such facts.

Addenda.

In *Kearsley v. Philips* (ee), it was decided, by the Court of Appeal, affirming the decision of the Queen's Bench Division (f), in accordance with the old case of *Murray v. Walter* (g), decided by Lord Cottenham in 1839, that the possession necessary for the production of documents being a sole possession, a party who objects to give production upon that ground is not bound to apply to the co-owner for liberty to produce, or to state in his affidavit that he has done so and been refused (h).

Kearsley v. Philips.
Possession for purpose of production.

In *Roe v. New York Association Press and Dekker* (i), the important question arose, upon which strong opinions had been expressed by the Court of Appeal in *Webb v. East* (k), viz., whether production of documents can be refused on the ground that they would tend to criminate the party producing. The action was for libel, and in his affidavit of documents the defendant objected to produce certain documents (admitted to be relevant), which were described by letters and bundles in the mode common since the cases of *Taylor v. Batten* (l) and *Bewicke v. Grahame* (m), on the ground that the production might, to the best of his information and belief, tend to criminate him.

Production of documents excused on ground of tendency to criminate.
Form of objection.

For the plaintiffs it was contended (1) that the objection came too late after the existence of the documents and their materiality had been admitted, (2) on the authority of the dicta in *Webb v. East*, that no such privilege existed, and (3) that it was not sufficiently claimed. The defendant relied upon *Hill v. Campbell* (n), decided before the Judicature Acts, and upon the latter point, on the recent case of *Lamb v. Munster* (o). None of the equity cases were cited.

The Court (Grove and Smith, JJ.) held, (1) that it was not too late to claim the privilege if it existed; (2) that *Hill v. Campbell*, by which they were bound, established the existence of the privilege, notwithstanding the doubts expressed by the Court of Appeal in *Webb v. East*; but (3) that the affidavit was insufficient, as not distinctly stating that the production would tend to criminate; and they distinguished *Lamb v. Munster*, as

(ee) 10 Q. B. D. 465.

(f) *Ib.* 36.

(g) Cr. & Ph. 114.

(h) The Court below laid considerable stress on the fact that the documents were the party's *muniments of title* (*ib.* 36).

(i) LXXV. Law Times, 31.

(k) 5 Ex. D. 108.

(l) 4 Q. B. D. 85.

(m) 7 *Ib.* 400.

(n) L. R. 10 C. P. 222.

(o) 10 Q. B. D. 110.

Addenda. being a case where the libel was set forth, and the defendant was asked whether he had published it, which must obviously tend to criminate, whereas, in the present case, the defendant alone could know the contents of the documents which were in his possession, and whether or not their production would tend to criminate him. Accordingly, leave was given him to file a further affidavit in support of the claim of privilege.

Information
procured in
contemplation
of litigation.

The case of *Westinghouse v. The Midland Railway Co.* (p) furnished a fresh illustration of the limitations put upon the second branch of professional privilege, i.e., information procured by the party in contemplation of litigation, and in its facts considerably resembled *Anderson v. The Bank of British Columbia* (q). The defendants had objected to produce certain documents, on the ground that they consisted of letters and reports written and made by their officials and advisers *with a view to possible litigation, and, in the event thereof, to be submitted to their solicitors*, and that such letters and reports had, in fact, been so submitted. Upon a summons being taken out for their production notwithstanding the objection, the defendants made a further affidavit claiming in substance for the documents that they had been prepared after a threat of litigation on the part of the plaintiff, and not in the ordinary course of business, but not showing that they had been prepared under the advice of the solicitors, or with a view to the particular litigation, which did not commence until a year after what the defendants professed to regard as a threat of litigation. Bacon, V.-C., ordered production, on the ground that there had been no threat of litigation, and the Court of Appeal (Baggallay and Lindley, LL. JJ.) affirmed his decision, holding the claim of privilege to be insufficient, even assuming that there had been such a threat, and Baggallay, L. J., said :—"The first affidavit does not specify what future litigation was expected, or that the documents were submitted to the defendants' solicitors in consequence of the advice given to the defendants (r). *It was only in case there should be some future litigation that the documents were to be so submitted.* That is not a sufficient ground of privilege." It will be observed that it was not shown that the documents, though ultimately laid before the solicitor, were prepared with the *bond fide* intention of being laid before him (s), and that more than a year had elapsed between their coming into existence and the commencement of the litigation against the party who procured them, which raised a strong inference to the contrary.

Official
liquidator
cannot be
called upon for

The practice with regard to obtaining discovery of documents by an adverse litigant from an official liquidator, when litigating on behalf of a company in winding-up, has been laid down by the

(p) 48 L. T. 98, 462 (C. A.).

(q) 2 Ch. D. 644.

(r) This is unnecessary if *bond fide* prepared for the purpose of being laid before the solicitor (*v. post*, p. 59).

(s) See *Southwark Water Co. v. Quick*, C. A. 3 Q. B. D. 315. In that case the documents were prepared by the *plaintiff*; in the present case by the *defendant*.

Court of Appeal in a recent case (*t*), where it was decided that an official liquidator is not in the position of an ordinary litigant, and cannot, on account of the expense and delay which would be occasioned, be called upon for an affidavit of documents under ordinary circumstances, but that it is his duty to offer his opponent inspection of any document on which he (the liquidator) relies, or which his opponent desires to see, a duty which the Court will enforce from him, as being its officer. Application should be made to him, therefore, before invoking the aid of the Court, and an order for discovery will not be made unless there is some good reason for mistrusting him or for supposing that he is trying to keep back documents (*u*).

Addenda.

an affidavit of documents except under special circumstances.

In *Ponsonby v. Hartley* (*x*), which was an action by the lord against the tenant of a manor to enforce a right to the minerals under the tenant's land, the question was whether the plaintiff was entitled to the production of documents fully alleged by the defendant to relate solely to his title to the land in question. For the defendant it was contended that the rule in ejectment that the plaintiff cannot obtain discovery of the defendant's title-deeds applied, but Pearson, J., ordered production on the ground that the rule had no application to such a case as that before him, where the defendant's title to the surface was admitted, and the only dispute was as to the mines. The Court of Appeal, after inspection of one of the documents in question, came to the conclusion that it did not tend to support the title of the plaintiff, and that the affidavit of documents claiming privilege for all the documents on this ground was to that extent inaccurate, and, consequently, could not be relied on as to the other documents (*y*). They, therefore, affirmed the order of the Court below, though on a different ground (*yy*).

Ponsonby v. Hartley.

Reasonable grounds for mistrusting claim of privilege.

Several important points of practice have also been decided. In *Prestney v. Mayor, &c., of Colchester* (*z*), the indulgence shown in the case of trade-books in constant use in permitting inspection of them to be given at the place where they are kept, instead of at the office of the producing party's solicitor, was extended to the case of the charters and muniments of the defendants, on account of their great age and value, their bulk, and their liability to destruction, leave being reserved to the inspecting party to apply for any additional costs occasioned him thereby.

Prestney v. Mayor of Colchester.

Practice as to place of inspection.

In *Mitchell v. The Darley Main Colliery Co.* (*a*) it was held, in accordance with a previous decision (*b*), that there is jurisdiction to order prospectively the costs of an inspection of property to be paid by the party inspecting, and that such an order is a discretionary.

Costs of inspection may be dealt with prospectively and are discretionary.

(*t*) *Re Mutual Society*, 22 Ch. D. 714, affirming the decision of Chitty, J.

(*u*) *Ib.* The application was by a director charged with misfeasance under s. 165 of the Companies Act, 1862.

(*x*) W. N. 1883, 13.

(*y*) See *A.-G. v. Emerson*, C. A., 10 Q. B. D. 191.

(*yy*) W. N. 1883, 44.

(*z*) 52 L. J. Ch. 346; W. N. 1883, 41; affirmed in C. A. (XXVII. S. J. 552).

(*a*) 10 Q. B. D. 457.

(*b*) *Vicary v. G. N. R.*, 9 *ib.* 168.

Addenda.
Orders must be entered in order to be enforced by attachment.

Order for delivery up of documents is within Ord. XXXI. r. 21.
Service of notice of motion for attachment upon solicitor.

tionary one, and cannot, therefore, be appealed from, without leave. Lastly, in *Ballard v. Tomlinson* (c), it was decided that orders made in Chambers must be duly entered (d) in order to their being enforced by attachment. It may be remarked that, by a recent rule (e), simple orders for further time for giving discovery need not be drawn up unless otherwise directed.

In *Joy v. Hadley* (f) Fry, J., held (1) that an order, under a judgment for specific performance of an agreement of sale, for the production of the documents relating to the property in question, was within r. 21 of Order XXXI., so that service of it upon the solicitor of the party was sufficient to found an application for an attachment for disobeying it, and (2), in accordance with several previous decisions, that in an action service of notice of motion for an attachment upon the solicitors of the party sought to be attached was sufficient.

The distinction recognised in *Kennedy v. Lyell* (g) is further illustrated by the recent case of *Pavitt v. North Metropolitan Tramways Co.* (h), where it was decided that discovery of the facts of a case cannot be withheld on the ground that the party interrogated first learned them through his solicitor in getting up his defence.

(c) 31 W. R. 563.

(d) See Consol. Ord. XXXV., r. 32.

(e) Rs. S. C., May, 1883, r. 10.

(f) 22 Ch. D. 571.

(g) 48 L. T. 455.

(h) W. N. 1883, 100.

THE
LAW AND PRACTICE
OF
DISCOVERY.

CHAPTER I.

INTRODUCTORY.

THE origin of the jurisdiction of the Court of Chancery to grant discovery, *i.e.*, the discovery of evidence, is thus described by Lord Langdale, M. R. (a): "From the mode of proceeding at common law, a man with the full knowledge of facts which would show the truth and justice of the case, may, by concealing those facts within his own breast, and merely for want of disclosure or evidence, succeed in recovering a demand which he knows to be satisfied, or in resisting a demand which he knows to be just. This conduct is by Courts of Equity considered to be *against conscience*; and they accordingly enable the party in danger of being oppressed by it to obtain from his adversary a discovery of the facts within his knowledge or belief, by filing a proper bill for the purpose; and by the general rule a defendant to a proper bill of discovery is bound to make a complete disclosure of everything he knows or believes in relation to the matter in question. According to the general rule, he is not to withhold anything. Almost every bill of discovery contains * * * a charge that the defendant has in his possession or power papers relating to the matter in question, and calls upon the defendant to set forth, as part of the discovery he is required to make, either the contents of the papers, or a list of the papers, in order to

CHAP. I.

Origin of bills
of discovery.

(a) 1 Keen, 349 *seq.*

CHAP. I.

their production; and by the general rule the defendant is bound to produce (as part of the discovery he is required to make, and to complete his answer, which would otherwise be imperfect) all the papers which he admits to be in his possession, and to relate to the matters in question." "However disagreeable it may be to make the disclosure, however fatal to the claim upon which he may have insisted, he is required and compelled, under the most solemn sanction, to set forth all he knows, believes, or thinks in relation to the matters in question" (b). Following its own rules as applied to actions at law, the Court gave a similar remedy where there was a suit in equity, so that every bill for relief was a bill for discovery also incidental thereto (c), and in process of time the Legislature thought fit to get rid of the necessity of resorting to Courts of Equity for discovery by empowering the Common Law Courts to give discovery in common law actions (d).

Functions of
discovery.

The functions of discovery (in the wider sense of the word) are threefold, viz., (1) to obtain discovery properly so called, *i.e.*, information as to matters known to the party interrogated and not known to the party interrogating, which are material for him to know; (2) to obtain admissions obviating the necessity of proof *aliunde* and saving trouble and expense; and (3) to ascertain the nature of the case set up by the opposite party (e).

Jurisdiction of
Supreme Court
to grant dis-
covery.

Since the passing of the Judicature Acts, 1873 and 1875, discovery is obtainable, either by means of an action for discovery only (f) (corresponding to the former bill of discovery), or the interlocutory processes of interrogatories and discovery of documents (according to the nature of the discovery sought) (g), in every division of the High Court of Justice to the same extent as it would formerly have been obtainable in the Court of Chancery, by bill of discovery or otherwise, the jurisdiction of that Court being now transferred to the High Court of Justice (h). Thus, discovery

(b) *Per* Lord Langdale, M. R., 8 Beav. 34.

(c) See *per* Jessel, M. R., 9 Ch. D. 555; W. pl. 11.

(d) See 14 & 15 Vic. c. 99 s. 6, and C. L. P. Act, 1854, ss. 50 *seq.*; *per* Jessel, M. R., *ubi supra*.

(e) See *A. G. v. Gaskill*, C. A., 20 Ch. D. 519.

(f) Ord. XIX. r. 8, *v. post*, p. 8.

(g) Ord. XXXI.

(h) S. C. J. Act, 1873, s. 16; *Ramsden v. Brearley*, W. N., 1875, 199; see *Bustros v. White*, C. A., 1 Q. B. D. 423, 426.

of the name of the printer or publisher of a newspaper, CHAP. I. which, under the 6 & 7 Wm. IV. c. 76, s. 19, before the passing of the Judicature Acts, could only have been obtained in equity by filing a bill of discovery (*i*), can now be obtained by administering interrogatories in any action for libel in the High Court (*k*).

In *Revenue matters*, the old jurisdiction is expressly retained (*l*). And, therefore, in informations in such matters, discovery must be obtained by the old process of bill and answer (*m*).

Actions for discovery, therefore, are no longer necessary in aid of *proceedings actually pending* in the High Court, where the same result can be obtained in each division of that Court by means of the above-mentioned interlocutory proceedings (*n*), taken in the course of the general proceedings for relief and ancillary thereto; but they may still be resorted to in aid of contemplated proceedings in the High Court (*o*), or proceedings before other Courts, foreign or colonial (*p*), or tribunals which cannot of themselves enforce the discovery sought, such as arbitrations (*q*). Actions for discovery only.

Every suitor in the Supreme Court of Justice, whether individual, corporate body, or foreign sovereign or state, is entitled to get, and with the exception (for reasons of state) of the sovereign of this country, and the Attorney-General as representing the sovereign, liable to give discovery (*r*), but a party is not disabled from suing because you cannot get discovery from him at all or effectively (*s*). From an infant, a lunatic, trustee, or executor, wholly ignorant of the occurrences which are the subject of the suit, no practical discovery can be obtained, and yet they can maintain a suit. The Court will, however, do its best to secure to the opponent General right to discovery.

(*i*) See *Dixon v. Enoch*, L. R. 12 Eq. 394; *Bowdler v. Allen*, 39 L. J. C. P. 317.

(*k*) *Ramsden v. Brearley*; *Lefroy v. Burnside*, 4 L. R. Ir. 340.

(*l*) *Ra.* April, 1880, r. 54.

(*m*) See *A. G. v. Emerson*, C. A., 52 L. J. Q. B. 67; 10 Q. B. D. 191.

(*n*) See *Ramsden v. Brearley*, *supra* (compare with *Bowdler v. Allen*, 39 L. J. C. P. 317, as showing the effect of the Jud. Acts); *Lefroy v. Burnside*, 4 L. R. Ir. 340.

(*o*) See *Orr v. Diaper*, 4 Ch. D. 92 (action by owners of trademarks against shippers of counterfeited goods to discover names of consignors).

(*p*) See *Reiner v. Lord Salisbury*, 2 *ib.* 378.

(*q*) See *Ainsworth v. Starkie*, W. N. 1876, 8, and *post*, p. 177.

(*r*) See *per Wood*, V.-C., L. R. 2 Eq. 664; *post*, pp. 163 *seq.*

(*s*) See *U. S. v. Wagner*, L. B. 2 Ch. App. 582.

CHAP. I. such defensive discovery and relief as he may be entitled to (t).

No discovery
from Crown or
Attorney-
General.

Again, the right of discovery is not always mutual; thus, the suppliant in a Petition of right is liable to give discovery at the instance of the Crown though not entitled to obtain it himself (u), (apparently because of the technical difficulties which stand in the way of obtaining an answer from the Sovereign (x)), and it has been held that the defendant in an information is not entitled to production of documents from the relators or the Attorney-General, on the ground that the former were merely parties as security for the costs of the information, and that the position of the latter, as representing the Sovereign, rendered it improper to require him to produce them (y). In such a case the proper course is to apply to the Attorney-General himself for the information not upon oath, and in one case the information was stayed until certain documents had been produced (not upon oath) from one of the public offices (z), while in another, a bill against the Attorney-General was ordered to be taken *pro confesso* for default of an answer (a).

Law of dis-
covery same
as before
Judicature
Acts.

The Judicature Acts make an alteration of procedure merely, and not an alteration of the law, and if there was no right to file a bill of discovery, or to administer interrogatories before the passing of those Acts, there is no such right now (b). Similarly, they do not enable a party to decline answering an interrogatory or giving discovery on any ground on which he could not have declined doing so before. The right of discovery remains the same (c). Where there is any conflict or variance between the rules (*i.e.*, *doctrines*) of equity, and the rules of the common law with reference to the same matter, the rules of equity are to prevail unless otherwise provided (d); consequently, the law and doctrines of discovery are now the same as they formerly were in the

(t) See *per* Lord Cairns, L. J. *ib.* 594-5; *per* Wood, V.-C. *ib.* 2 Eq. 665.

(u) *Thomas v. Reg.*, L. R. 10 Q. B. 44; *Tomline v. The Queen*, 4 Ex. D. 252.

(x) *Ib.*

(y) *A. G. v. Clapham*, 10 Hare, App. lxviii.; Dan. 1682. Relators seem now to be in the position of ordinary plaintiffs (Ord. I. r. 1).

(z) *A. G. v. Brooksbank*, 1 Y. & J. 439.

(a) *Peto v. A. G.*, *ib.* 509; *Deare v. A. G.*, 1 Y. & C. 197.

(b) *Per* Jessel, M. R., 20 Ch. D. 489; *Hunnings v. Williamson*, 10 Q. B. D. 459.

(c) See *A. G. v. Gaskill*, C. A., 20 Ch. D. 519.

(d) S. C. J. Act, 1873, s. 25, sub-s. 11; *cf.* *Bustros v. White*, C. A. 1 Q. B. D. 423; *Atherley v. Harvey*, 2 Q. B. D. 524; *Bewiche v. Graham*, C. A., 7 *ib.* 480.

Court of Chancery (*e*), and the decisions of that Court should be looked to in order to ascertain the principle on which the Court is now to act (*f*). CHAP. I.

The *practice* as to discovery is no longer regulated by the orders of the Court of Chancery, or the Common Law Procedure Acts, or the custom or practice of the former Common Law Courts, but is a new intermediate practice depending upon the Orders and Rules framed under the Judicature Acts, (which follow the extended principles of the Court of Chancery, rather than the narrower practice of the Courts of Common Law (*g*)), supplemented, where no special provision is found therein, by all such forms and methods of procedure existing formerly in those Courts as are not inconsistent with the Acts or Rules (*h*); and in all cases within the Acts where no special steps in proceedings are prescribed, the proceedings are to be as nearly like as they can to analogous proceedings before those Acts (*k*). If there is provision made, there is an end of the old practice, and that provision only applies (*l*), but, subject to the rules, the old practice remains, a very large body of which was left unprovided for by the rules (*m*). Practice as to discovery.

Where, owing to the silence of the new orders on a point of practice, it becomes necessary to fall back upon the old practice, and there is a variance in that particular case between the practice of the former Chancery and Common Law Courts, that practice is to prevail which is considered by the Court of Appeal the more convenient (*n*).

The rules do not confer any new, or take away any old, right to discovery, being mere rules of procedure and not intended to alter the law of discovery or the rights of practice (*o*), but only regulate the period within which, the

(*e*) *V. supra*, and *per* Field, J., 10 Q. B. D. 41.

(*f*) See *per* Brett, L. J., *ib.* 466.

(*g*) See *per* Brett, L. J., 5 Q. B. D. 558 *seq.*; 20 Ch. D. 405; *per* Jessel, M. R., 9 *ib.* 556.

(*h*) Jud. Act, 1873, s. 23; *ib.* 1875, s. 21, and Sched. 1; *per* Jessel, M. R., 9 Ch. D. 554.

(*k*) See *per* Brett, L. J., 8 Q. B. D. 477.

(*l*) *Per* Jessel, M. R., 9 Ch. D. 554 (see *per eund.*, 20 *ib.* 526); *per* Lindley, L. J., *ib.* 530.

(*m*) See *per* Jessel, M. R., 8 Q. B. D. 145.

(*n*) See *per* Jessel, M. R., 20 Ch. D. 243; *Newbiggin Gas Co. v. Armstrong*, 13 *ib.* 310; *Nurse v. Durnford*, *ib.* 764; *Smith v. Day*, 44 L. T. 217.

(*o*) See *A. G. v. Gaskill*, C. A., 20 Ch. D. 519; *Lyell v. Kennedy*, C. A. *ib.* 464; s. c. 52 L. J. Ch. 385 (H. L.); *Hunnings v. Williamson*, 10 Q. B. D. 458.

- CHAP. I.** mode in which, and the time at which discovery which could have been obtained before is to be obtained now (*p*).
- Construction of rules and orders.** The rules dealing with discovery being mainly founded upon the practice of the former Court of Chancery, and in many instances almost verbally identical with the rules laid down for that Court, must necessarily receive the same interpretation (*q*), even though the wording of them may in some instances differ very little from that of the previous Common Law enactments (*r*).
- Common law decisions.** The decisions in the Common Law Courts, so far as they proceeded, not upon the rules of equity, which appear to have been not unfrequently misunderstood in those Courts, but upon the powers conferred upon the judges by the C. L. P. Acts, 1854, and the discretion assumed by them thereunder in granting discovery, are no longer authorities as to granting discovery under the new procedure (*s*).
- Applications in discovery.** Applications in matters relating to discovery, should, as a rule, be made by Summons in Chambers (*t*), and to a Master in the Queen's Bench Division (*u*), the Chief Clerk of the Judge to whom the action is attached, in the Chancery Division (*uu*), a judge or (by consent) a registrar, in the Probate *etc.* Division (*x*), and the Registrar, where the action is proceeding in a district Registry (*xx*).
- (*p*) See *per* Brett, L. J., 20 Ch. D. 491.
- (*q*) See *Bustros v. White*, C. A., 1 Q. B. D. 423; *Anderson v. Bank of Brit. Columbia*, C. A., 2 Ch. D. 644; *per* Pollock, B., 7 Q. B. D. 406. The rules as to discovery from corporations, &c., are borrowed from the C. L. P. Act, 1854, s. 51 (see *Wilson v. Church*, 9 Ch. D. 552).
- (*r*) See *per* Jessel, M. R., 2 Ch. D. 654; *per* Mellish, L. J., *ib.* 658; *Bustros v. White*; *Atherley v. Harvey*, *supra*.
- (*s*) See *per* Jessel, M. R., 2 Ch. D. 654.
- (*t*) See *Wilson v. Church*, 9 Ch. D. 552; *Freason v. Lee*, 26 W. R. 138. The exceptional cases are noticed in their places as they occur.
- (*u*) Ord. L.V. r. 2, as amended by r. 4 of Rs. S. C., Nov. 1878.
- (*uu*) *Dauvillier v. Myers*, 17 Ch. D. 346.
- (*x*) Ord. LIV. r. 2.
- (*xx*) Ord. XXXV. r. 4.

CHAPTER II.

OF THE PROCEEDINGS IN WHICH AND THE PARTIES BETWEEN WHOM DISCOVERY IS OBTAINABLE.

DISCOVERY can only be obtained in *civil proceedings* (a), *i.e.*, **CHAP. II.** proceedings for enforcing a civil right or claim, including a mandamus for the purpose of enforcing the payment of a sum of money or other civil right (b), but not to aid the prosecution of an indictment or criminal information, or the defence to it (c). Discovery only obtainable in civil proceedings.

Discovery by interrogatories is obtainable only in *actions*, *i.e.*, civil proceedings between a plaintiff and a defendant only in actions commenced by writ (d), which include informations (other than in Revenue matters) (e), and was formerly only obtainable as between *parties to the record* (f), *i.e.*, plaintiffs and defendants, but is now, owing to the introduction into actions of counter claims and a new class of litigants styled "third parties," obtainable as between the following litigants, as being *opposite parties* (g), *i.e.*, parties between whom Interrogatories obtainable in actions and between opposite parties.

(a) W. pl. 10; *cf.* *Hunnings v. Williamson*, 10 Q. B. D. 459.

(b) See *Queen v. Ambergate Ry. Co.*, 17 Q. B. 957, 963; *Reg. v. York, &c. Ry.*, 19 L. T. 108.

(c) W. pl. 10.

(d) Jud. Act, 1873, s. 100. See, as to what proceedings are now to be taken by actions, Ord. I. r. 1. In the Court of Chancery, interrogatories could not have been delivered in a suit by claim (see *Wing v. Harvey*, 1 Sm. & Giff. App. x.).

(e) *A. G. v. Shrewsbury Bridge Co.*, 42 L. T. 79; *v. ante*, p. 3.

(f) See *Queen of Portugal v. Glyn*, 7 Cl. & F. 466. The case of actions on policies of marine insurance is an exception (*v. post*, p. 168). That interrogatories cannot be administered to a non-party even though the real plaintiff, see *Massey v. Allen*, W. N. 1878, 240. Persons made parties to a suit by supplemental orders under 15 & 16 Vict. c. 86, s. 52, were parties for the purpose of discovery (*Anon.* 25 L. T. O. S. 61). A next friend is not a party for discovery (*v. post*, p. 9).

(g) See Ord. XXXI. rs. 1, 4, and 23; *Molloy v. Kilby*, C. A., 15 Ch. D. 162.

CHAP. II. an issue is joined, and not merely parties having adverse interests (h);

1. **Plaintiffs and Third parties** brought into the action to litigate a question or issue with them (*gg*).

2. **Defendants counter-claiming and persons made Defendants to such counter-claims**, whether original defendants on the record or not (*hh*).

3. **Co-Defendants permitted to raise cross-claims, inter se** (under Jud. Act, 1873, s. 24, sub-s. 3 (*i*), and Ord. XVI. r. 17).

Proceedings
equivalent
to actions.

Discovery is also obtainable to the same extent as in actions in proceedings which are in substance though not in form *actions*, as between the parties who are substantially in the position of plaintiffs and defendants therein, for the policy of the Court is to give the most ample means to every person who is before it to obtain discovery upon oath of every document or writing which may be evidence of title, or which enables him to establish a claim which he prefers before the Court (*k*); thus, it is obtainable in :

1. Proceedings between an official liquidator litigating on behalf of a company in process of winding up, and alleged shareholders, contributories, or creditors (*l*).

2. Claims by creditors against estates in the course of

(*h*) See *per* Cotton, L. J., *ib.* 164.

(*gg*) Under Ord. XVI. rr. 17—21. *Benyon v. Godden*, C. A., W. N., 1877, 257; *MacAllister v. Bishop of Rochester*, 5 C. P. D. 194, 207; *Molloy v. Kilby*, *supra*; *cf.* *Dent v. D.*, L. R. 1 Eq. 186 (under old practice). Such persons after being brought in are to be deemed *parties* (S. C. J. Act 1873, s. 24, sub-s. 3; *Hornby v. Cardwell*, C. A., 8 Q. B. D. 329), and the definition of "defendant" in s. 100 is wide enough to include them. By a logical extension of the above rule discovery should be obtainable as between a plaintiff or a *fourth or subsequent party* similarly brought in by the third party, if filling the position of a litigant as regards the plaintiff (see *Fowler v. Knoop*, 36 L. T. 218; *Witham v. Vane*, 49 L. J. Ch. 242; *York Wagon Co. v. Newport Coal Co.*, 5 Q. B. D. 268).

(*hh*) This follows from the position of a counterclaiming defendant who is *plaintiff* in all but the name, and whose counterclaim is in substance a cross action (*Winterfield v. Bradnum*, C. A., 3 Q. B. D. 324).

(*i*) See, as to when such cross-claims may be set up, *Bagot v. Easton*, 11 Ch. D. 392; *Marnier v. Bright*, *ib.* 394, n.; *Butler v. B.*, 14 *ib.* 329. This is in accordance with the former Chancery practice (see Dan. 1682).

(*k*) *Per* Stuart, V.-C., 9 Jur. N. S. 789.

(*l*) *Re Barned's Bank Co.*, L. R. 2 Ch. App. 350; *Gooch's case*, 7 *ib.* 212; *Re Nat. Funds Ass. Co.* C. A., 24 W. R. 774; *Re Alex. Palace Co.*, 16 Ch. D. 58; *Re Constantinople, &c. Co.*, 35 Beav. 349. See, however, *Re Mutual Society*, C. A., 22 Ch. D. 714. The reason for granting discovery in such cases is, that after the commencement of the proceedings no action can be brought, and, consequently, the suitor would otherwise be deprived of his right to discovery.

administration by the Court, and other claims under judgment (*m*), such claimants being in very much the same position as plaintiffs in an action (*n*). CHAP. II.

3. Interpleader issues (*o*), or feigned issues (*p*).

Discovery of documents can be obtained, not only in actions and proceedings equivalent to actions such as above referred to, but in *all civil proceedings* (which include suits, petitions, motions, and summonses) (*q*), and, consequently, is not only obtainable as between plaintiffs and defendants, and other *opposite* parties, but, in the language of the rules by "*any party*" from "*any other party*" (*r*), which would apparently include "*side by side parties*." An official liquidator is not in the position of an ordinary litigant, and cannot be called upon for an affidavit of documents, except under special circumstances (*rr*), and a next friend is not a party for the purpose of discovery (*s*). Prior to the Judicature Acts, it was held to be obtainable by a person who had *consented to be treated as a party to an action*, and to be bound by the decision given in it, from a party to the action between whom and himself questions had arisen (*ss*), and from the claimant of property seized under a sequestration, an inquiry *pro interesse suo* having been directed (*t*). From the very nature of the case, however, it is only obtainable (before judgment) as between parties between whom issues or questions are to be litigated (*u*) (the only object of discovery being to assist the decision of some disputed question), or, at the least, having *adverse interests*, and seeking in some form or other relief against

Discovery of documents not confined to actions.

(*m*) See *Rowcliffe v. Leigh*, C. A., 6 Ch. D. 256; *Groves v. G.*, Kay, App. xix.; Dan. 1683; *v. post*, p. 18, Discovery after judgment.

(*n*) *Per* Lord Romilly, M. R., L. R. 5 Eq. 292. See also *per* Stuart, V.-C., 11 W. R. 820.

(*o*) See Ord. XXXI. rr. 19 and 23 (action or issue); *White v. Watts*, 12 C. B. N. S. 267.

(*p*) *Scarth v. Williams*, W. N. 1875, 218; *Riccard v. Inclos. Comm.* 4 E. & B. 329.

(*q*) See Jud. Act, 1873, s. 100; discovery of documents could be obtained in a suit by claim (*Wing v. Harvey*, 1 Sm. & Giff. X.), or a cause petition (*Peyton v. Lambert*, 6 Ir. Ch. Rep. 9). See *Re Nat. Funds Ass. Co.*, 24 W. R. 774; *Re Hoover Gold Co.*, XXVII. S. J. 434 (winding-up petitions).

(*r*) See Ord. XXXI. rs. 11, 12, 14; *MacAllister v. Bishop of Rochester*, 5 C. P. D. 194, 207. See, as to what "party" includes, Jud. Act. 1873, s. 100.

(*rr*) *Re Mutual Society*, C. A., 22 Ch. D. 714.

(*s*) *Re Corsellis*, 52 L. J. Ch. 399.

(*t*) See *Dent v. D.*, L. R. 1 Eq. 126.

(*u*) *Alton v. Harrison*, W. N. 1869. 81.

(*u*) See Jud. Act, 1873, s. 100 (definitions of *Plaintiff* and *Petitioner*).

CHAP. II. each other, and not as between mere "side to side" parties (*x*). It is not obtainable therefore between :

1. **A defendant and a co-defendant** (unless permitted to raise cross-claims *inter se*) to an action or counter-claim (*y*).

2. **Defendants and third parties brought in by them** (*z*), unless an issue is raised between them (*a*). If, therefore, a person who is made co-defendant with a plaintiff to a counter-claim desires discovery from the plaintiff in the original action, for the purposes of his defence, his proper course is to get himself made an opposite party by becoming a defendant to the original action, and so put himself in a position to obtain it (*b*).

Inspection of documents referred to in proceedings.

In petitions, motions, summonses, and other similar proceedings pending before the Court, production and inspection of any documents referred to therein, or in the affidavits used in support thereof, can be obtained at the instance of the opposite party, or the Court or Judge may order it *suo motu* (*c*); and by section 46 of the C. L. P. Act, 1854, (which appears to be still in force) upon the hearing of any motion or summons (which includes in the former case an *ex parte* application for a *rule nisi*, as well as the hearing of an argument or showing cause) (*d*), the Court or Judge may, upon such terms as shall appear reasonable, order such documents as they shall think fit to be produced, the intention being that whenever during the progress of any proceeding or motion or summons at chambers, justice may be aided by the production of documents, or the examination of witnesses, an order may be made for that purpose (*e*).

(*x*) See *per* Jessel, M. R., 15 Ch. D. 164.

(*y*) *V. ante*, p. 8; *Molloy v. Kilby*, *ib.* 162; Dan. 1682. *After judgment* it is otherwise (*v. post*, p. 20).

(*z*) Under Ord. XVI. r. 18. This would seem to follow from the fact that *no relief is obtainable as between a defendant and a party from whom he claims contribution, indemnity or relief over* (see *per* Mellish, L. J. 45 L. J. Ch. 113; *Padwick v. Scott*, 2 Ch. D. 736). Such a party is, in fact, a *side to side party* with the defendant as against the plaintiff, whose claim they are equally interested in defeating.

(*a*) See *The Carlsburn*, C. A., 5 P. D. 59; *Hornby v. Cardwell*, 30 W. R. 263.

(*b*) *Per* Jessel, M. R., 15 Ch. D. 163.

(*c*) Ord. XXXI. rr. 11 and 14; *Re Credit Co.*, 11 Ch. D. 256. "Pleading" includes petition or summons (S. C. J. Act, 1873, s. 100); *v. post*, p. 122, "Inspection of documents referred to in pleadings or affidavits."

(*d*) *Morgan v. Alexander*, L. R. 10 C. P. 184.

(*e*) See *Ashcroft v. Foulkes*, 18 C. B. 261; *per* Lord Coleridge, C. J., L. R. 10 C. P. 185.

Upon an application by a plaintiff to sign judgment under Order XIV., the defendant may be ordered to produce books or documents or copies of or extracts from them (*f*). CHAP. II.

It seems that, as a general rule, parties cannot be kept before the Court merely for the purpose of obtaining discovery from them (*g*). The rule that a person implicated in a fraudulent transaction may be made a party to a suit impeaching the transaction, for purposes of discovery and costs, is confined to cases in which the defendant fills the position of *agent* (including that of *solicitor*) or *arbitrator* (*h*). Parties for
discovery
only.

(*f*) *Ib.* r. 3. This provision is, as far as the writer is aware, a dead letter.

(*g*) *Berry v. Keen*, C. A., 26 Sol. Journ. 312; see *per* Baggallay, L. J., 19 Ch. D. 336; *per* Lush, L. J., *ib.* 337; *Wilson v. Church*, 9 *ib.* 552.

(*h*) *Weise v. Wardle*, L. R. 19 Eq. 171.

CHAPTER III.

OF THE TIME AT WHICH DISCOVERY IS OBTAINABLE.

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Stage at which
discovery is
obtainable.

IN order to confer a right to discovery, there must either be an action for that purpose or an action or other proceeding for relief pending before the Court in which the discovery is sought (a). Thus, after an action has been referred by consent to a referee for decision, the Court has no longer jurisdiction to order discovery (aa). It is sufficient, however, that there is an *appeal* pending at the time (b).

The Rules empower a plaintiff to deliver interrogatories, as of right, *together with his statement of claim*, and a defendant *with his statement of defence*, and either party to do so *at any time* by leave (c), and authorise applications for production of documents by any party *at any time during the pending of the action or proceeding* (d). It is well established, however, in practice that, (1.) the generality in this respect of the language used in Rules 11 and 12 of Order XXXI. must be restricted by reference to the provisions of Rule 1 (e); (2.) in the case of that rule itself, the object of permitting delivery of interrogatories as of right was to alter, to that extent, the previous Common Law Practice under the C. L. P. Act, 1854 (f), and especially to preserve the right which a plaintiff possessed in the Court of Chancery of filing interrogatories with his bill, not to make their delivery at the earliest possible stages a matter of course in

(a) *Re Burton, &c. Co.*, 31 L. J. Q. B. 62. Ord. XXXI. rs. 1, 11, 12, 14. See *post*, p. 18 (*Discovery after Judgment*).

(aa) *Penrice v. Williams*, 31 W. R. 496.

(b) *Re Nat. Funds Ass. Co.*, 24 W. R. 774.; *v. post*, p. 177.

(c) Ord. XXXI. r. 1.

(d) *Ib.* rs. 11—12; see also r. 14.

(e) *Cashin v. Craddock* (No. 1), 2 Ch. D. 140; see *per* Chatterton, V.-C., 1 L. R. (Ir.) 494.

(f) See *per* Mellish, L. J., 1 Q. B. D. 444.

all actions; and (3.) the period indicated by the rules as the proper one, in the great majority of cases, for obtaining discovery, is that intervening between the delivery of the defence and the close of the pleadings, or a reasonable time thereafter (g).

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The following propositions are submitted as the result of the rules and the decisions thereon, with regard to the earliest stage at which discovery is obtainable in actions:—

1. As a general rule, in all actions, other than “Chancery actions” (h), a plaintiff is not entitled to discovery until a statement of defence has been delivered, or the time for doing so has expired, because until then it is, in ordinary cases, impossible to see what the matters in question are (i), or whether the discovery sought should not be postponed, on the ground that the right to it depends on the determination of some issue or question intended to be disputed, or that some issue or question should be determined before deciding upon the right (k), unless there are either pleadings showing the questions in dispute, or an affidavit disclosing a special case for discovery and production (l). Until defence, as a rule, you cannot tell that an application for discovery may not be either a mere fishing application, or an application which may be made merely for the purpose of swelling costs which it may be quite unnecessary to incur, or an application which may be futile on the ground that it may be acquiring information as to matter which, when the pleadings are more advanced, and when the parties know each what the allegation of the

Plaintiff not
entitled to
discovery be-
fore defence.

(g) *Cashin v. Craddock*, *supra*; *Harbord v. Monk*, 9 Ch. D. 616; *Union Bk. v. Manby*, C. A., 13 ib. 239; *Mercier v. Cotton*, C. A., 1 Q. B. D. 442; *Quiller v. Heatley*, C. A., 31 W. R. 330.

(h) By “Chancery actions” are meant, not merely actions brought in the Chancery Division (see *Davies v. Williams*, 49 L. J. Ch. 352), but such as would formerly have been only maintainable by bill in Chancery (see Dan. 471 *seq.*), and are now specially assigned to the Chancery Division (see Jud. Act, 1873, s. 34, sub-ss. 2 & 3), as distinguished from Common Law actions, *i.e.*, actions for damages or pecuniary compensation and for the recovery of land (see *Rogers v. Jones*, 7 Ch. D. 345), which are assigned to the Queen’s Bench Division (s. 34, *supra*).

(i) *Mercier v. Cotton*, C. A., 1 Q. B. D. 442; *Hancock v. Guerin*, 4 Ex. D. 1; *Davies v. Williams*, 49 L. J. Ch. 352; *Philipps v. P.*, (No. 2) 40 L. T. 815; *Quiller v. Heatley*, 31 W. R. 330; *Cleary v. Fitzgerald*, 1 L. R. (Ir.) 492. This proposition must, so far as *interrogatories* are concerned, be read as subject to proposition 3, *post*.

(k) See *per Chatterton, V.-C.*, in *Cleary v. Fitzgerald*, at p. 495; *post*, p. 29.

(l) *Ib.*; *per Denman, J.*, 40 L. T. 820.

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other is, may become perfectly clear and out of the way of litigation (*m*). A defendant in an action who has dispensed with a statement of claim and put in his defence will not be permitted to oppose an application for discovery or inspection, on the ground that no statement of claim has been delivered, as the indorsement on the writ of summons and the statement of defence will be taken as disclosing the questions at issue (*n*).

Except in
"Chancery
actions."

2. In actions which are of the nature of Chancery actions *par excellence* (*o*), a plaintiff is entitled to discovery *as soon as he has delivered his statement of claim* (*p*), because in such actions there can be little or no doubt what the matters in question are, and even if his whole case should be admitted, he may want discovery to know if any other parties are interested (*pp*).

Statutory
right to
deliver in-
terrogatories
with claim.

3. In all actions, Chancery or Common Law, a plaintiff has under Order XXXI. Rule 1, a *statutory right to deliver interrogatories together with his statement of claim*, subject to the liability to have them struck out or postponed as premature or unnecessary under Rule 5 of that Order, unless some reasonable grounds for wanting the discovery at that stage are shown, it not having been intended to make the delivery of them a mere matter of course in all cases (*q*).

Earlier dis-
covery ob-
tainable under
special cir-
cumstances.

4. Under *very special circumstances* (of which some proof must be given by affidavit or otherwise), and by leave of the Court, a plaintiff may obtain discovery at earlier stages than those above indicated (*r*). Thus, he may be allowed discovery *before delivery of a statement of claim* where absolutely necessary in order to enable him to present his case to the Court properly (*s*), or where the time for the trial

(*m*) *Per Denman, J.*, 40 L. T. 818.

(*n*) See *Cleary v. Fitzgerald*, L. R. (Ir.) 1 Ch. D. 492.

(*o*) *V. ante, (h)*.

(*p*) *Harbord v. Monk*, 9 Ch. D. 616; *Union Bank v. Manby*, C. A., 13 *ib.* 239 (redemption action). This is agreeable to the practice of the former Court of Chancery (see 15 & 16 Vict. c. 86, ss. 12 and 18, and Consol. Ord. 1860, Ord. XI.).

(*pp*) See *per James, L. J.* 13 *ib.* 241.

(*q*) *Mercier v. Cotton*, C. A., 1 Q. B. D. 442; *Ocksley v. Redfern*, 61 L. T. 123; *Beal v. Pilling*, 38 L. T. 486 (the latter cases show what will be considered reasonable grounds for so delivering them). In such a case the interrogatories will be struck out without prejudice to any fresh ones which the party may be advised to deliver (*Anon.* W. N. 1876, 39).

(*r*) See Ord. XXXI. r. 1; *Cleary v. Fitzgerald*, 1 L. R. (Ir.) 492; *Acheson v. Henry*, Ir. R. 5 C. L. 496.

(*s*) See *per Mellish, L. J.*, in *Mercier v. Cotton*, *supra*, p. 445; *Philipps v. P.* (No. 1), 4 Q. B. D. 127, 140; *Beal v. Pilling*, *supra*; *Harbord v.*

is drawing near (*t*). Similarly, discovery has been allowed him at this stage where he is *desirous of amending his statement of claim* by adding parties or otherwise (*u*), or (which is the same thing) is *ordered to give particulars of his claim*, and cannot do so without discovery, because the necessary materials are in the possession of the opposite party (*x*) (but not merely on the ground that it would be *troublesome* to draw his statement of claim without getting discovery), or where he alleges *fraud* (*y*). In one case discovery was allowed (on affidavit) at this stage to ascertain whether it was worth the plaintiff's while to proceed with his action (*z*). *A strong case, however, must be made out for such an indulgence*, as the power might conceivably be used for very oppressive purposes (*a*), and the plaintiff may be required to show by affidavit what his cause of action is (*b*); the Court should be satisfied that it is assisting not a mere fishing or speculative case, but a case apparently resting upon something like a fair and reasonable foundation for the commencement of an action on the part of the plaintiff (*c*).

5. As a general rule, a defendant will not, in either a Chancery or Common Law action, be allowed discovery *until he has put in a statement of defence* (*d*), but, as in the case of a plaintiff, the existence of *exceptional circumstances* may entitle him to do so. Thus, he will be allowed to inter-

Defendant not entitled to discovery before defence, except under special circumstances.

Monk, 9 Ch. D. 616; *The Murillo*, 28 L. T. 374. Such cases occur more frequently in the Chancery than in the other Divisions (see *per Mellish*, L. J., *ubi supra*). According to the practice of the former Common Law Courts in such cases, a plaintiff was usually left to frame the best pleading he could with his present materials and amend afterwards when he had got discovery (see *Morris v. Parr*, 6 B. & S. 203; *Jones v. Pratt*, 6 H. & N. 697).

(*t*) *Per Blackburn*, J., 6 B. & S. 207.

(*u*) *Jones v. Turner*, W. N. 1875, 239; *Ocksley v. Redfern*, LXI. Law Times, 123; *Hancock v. Labache*, 3 C. P. D. 202; *The Murillo*, 28 L. T. 374 (interrogatories allowed before delivery of amended claim to ascertain necessary parties).

(*x*) *Per Bramwell*, L. J., 4 Q. B. D. 131; *per Denman*, J., 40 L. T. 819.

(*y*) *Per Lindley*, J., in *Strong v. Tappin*, W. N. 1876, 22; *cf. Harbord v. Monk*, 9 Ch. D. 616.

(*z*) *Acheson v. Henry*, Ir. Rep. 5 C. L. 496; *O'Connell v. Barry*, 2 *ib.* 648. (*a*) *Per Archibald*, J., *Anon.* W. N. 1876, 53; and see *per Lindley*, J., in *Strong v. Tappin*, *ib.* 22; *Philipps v. P.* (No. 2), 40 L. T. 815; *Morris v. Parr*, *supra*; *re Hoover Gold Co.*, XXVII. S. J. 434.

(*b*) *Ib.*; *Croomes v. Morrison*, 5 E. & B. 985.

(*c*) See *per Denman*, J., 40 L. T. 818; *Atter v. Willison*, 7 W. R. 265; *Stein v. Tabor*, 31 L. T. 444.

(*d*) *Disney v. Longbourne*, 2 Ch. D. 704; *Webster v. Whewall*, 15 *ib.* 120; see *Augustinus v. Nerinckx*, C. A., 16 *ib.* 14. This is in accordance with the former practice of the Court of Chancery (see 15 & 16 Vict. c. 86, s. 19-20, *Small v. Lay*, 22 L. T. 785, and cases cited *post*, p. 16)

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rogate a plaintiff before putting in his defence, and to have the time for doing so extended until after an answer has been given, or even before appearance, where such a course is calculated to save expense and further litigation by putting an end to the action (*e*), or where he is desirous of paying money into Court (*f*). To entitle himself to discovery at such a stage, the defendant must make out a case of *necessity founded on special circumstances clearly manifested*, and the affidavit in support of such an application must in some measure state the grounds on which the necessity arises, a mere statement that the discovery sought *may* afford the defendant material information for his defence not being sufficient (*g*). In accordance with the later practice of the Court of Chancery (*h*), a defendant will not now be allowed discovery merely because he alleges that he is personally ignorant of the matters in respect of which relief is claimed, and is unable to put in a defence without further information, his proper course being, in such a case, to put in the best defence he can, and then amend, if necessary, after he has obtained discovery (*i*), or to get particulars. In a case of alleged fraud, if the Court were to compel the plaintiff to produce the evidence on which he founds his charge, before the defendant puts in his answer, the defendant would be enabled to shape his defence according to the evidence which he knew to be in the plaintiff's possession (*k*). The rule has no application, however, in the case of a defendant desiring to see *documents referred to by the plaintiff in his statement of claim*, as to which, the fact that the defendant requires to see them before pleading, is a very good reason for ordering them to be produced (*l*).

Discovery as
matter of
course between
defence and
close of
pleadings.

6. In all actions, interrogatories may be delivered as of right (*m*), and an order for discovery of documents obtained

(*e*) *Hawley v. Reade*, W. N. 1876, 64 (*cf. Parker v. Wood*, *ib.* 56); *Anon.* *ib.* 1875, 220; *Harbord v. Monk*, 9 Ch. D. 616; *Gourley v. Plimsoll*, L. R. 8 C. P. 362.

(*f*) *Megaw v. M'Diarmid*, 10 L. R. Ir. 376.

(*g*) See *per* Lord Eldon, L. C., 1 Swanst. 124, 126; *cf. Gourley v. Plimsoll*; *Martin v. Hemming*, 10 Ex. 487.

(*h*) See *per* Turner, L. J., in *Halliday v. Temple*, 8 De G. M. & G. 96; *Philips v. Pennefather*, L. R. (Ir.) 3 Eq. 12.

(*i*) *Disney v. Longbourne*, 2 Ch. D. 704.

(*k*) *Per* Turner, L. J., 8 De G. M. & G. 99; see *Turner v. Burkinshaw*, 4 Giff. 399.

(*l*) *V. post*, p. 123.

(*m*) Ord. XXXI. r. 1.

as a matter of course, so far as the time of the application is concerned, by either party, *between the delivery of the defence and the close of the pleadings* (n). CHAP. III.
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7. After the close of the pleadings, discovery can be obtained, *by leave, at any time before the trial of the action* (o), even where there has been great delay on the part of the party seeking it (p), provided that the trial of the action will not be delayed thereby (q). Thus, in the Court of Chancery, it has been granted even after publication of evidence had passed. There is a discretion, however, as to granting it, and some explanation of the delay, by affidavit or otherwise, may be required (r). It seems that an order for production cannot be made *at the trial* (s). After close
of pleadings
by leave.

In the case of parties other than plaintiffs or defendants, such as third parties (t), it is conceived that in the absence of any special direction upon the subject, they would be very much in the position of ordinary defendants in this respect, and therefore would not, as a rule, be allowed discovery until they had put in a statement. Discovery by
other parties.

In actions and other proceedings in the course of which no pleadings are, according to the practice of the Court, delivered, and consequently the time for obtaining discovery cannot be regulated by reference thereto, the only rule that can be laid down is, that discovery will be allowed as soon as it appears (from affidavits or otherwise) *what the matters in question are* (u), e.g., in feigned issues, or interpleader issues, as soon as the issues have been delivered between the parties (x), and in actions where no pleadings are delivered, as soon as the issues have been settled (xx). Where no
pleadings.

(n) See *per* Archibald, J., *Anon.*, W. N. 1876, 53; *ib.* 54.

(o) Ord. XXXI. r. 1; see *per* Jessel, M. R., in *Disney v. Longbourne*, 2 Ch. D. 704, 705.

(p) *Brancker v. Carne*, L. R. 2 Eq. 611; *Lond. etc. Ins. Co. v. Davies*, 5 Ch. D. 775; *Rochdale Canal Co., v. King*, 15 Beav. 11; see Dan. 1678 n. (n), where it is stated that an applicant for discovery was not, as a rule, prejudiced by delay in making the application; see, however, *Dennis v. Rochussen*, 4 Jur. N. S. 298.

(q) See the form of order made in *Lond. etc. Ins. Co. v. Davies*, *supra*; *Anon.*, W. N. 1875, 238; *Zarifi v. Thornton*, 3 Jur. N. S. 92. The applicant is, as a rule, ordered to pay the costs of the application (*v. post*, p. 183).

(r) *Ellis v. Ambler*, 36 L. T. 410; *Whelan v. Shaw*, 12 Ir. L. T. 50.

(s) *Dauvillier v. Myers*, 17 Ch. D. 346.

(t) *V. ante*, pp. 8, 10.

(u) See *Hancock v. Guerin*, 4 Ex. D. 3; *Phillips v. P.*, 40 L. T. 815.

(x) This is the common practice in interpleader issues.

(xx) See Ord. XXVI.

SECT. 2.—*Discovery after Judgment (h).*CHAP. III.
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judgment.In administra-
tion actions
or actions
for account.Between
creditors and
executors or
administrators.

Discovery may be obtained, not only for the purposes of the trial or hearing of an action or proceeding, but *at any time during the pendency of an action or proceeding*, and may, consequently, be obtained *after judgment (i)* (and *semble*, after *final judgment*, so long as the judgment remains unsatisfied or any proceeding can be taken upon it (*k*)), and the same rules and procedure apply *mutatis mutandis* as in the case of discovery before judgment (*a*).

Discovery after judgment may be requisite in *proceedings in chambers under judgments in administration actions*, or other actions involving *inquiries or the taking of accounts in working out the judgment*, also under judgments directing an *account where the discovery has been refused or postponed before trial* as not being sufficiently material at that stage of the action (*b*); and it is no longer necessary to insert a direction for the production of documents in chambers in the judgment, as the Judge in chambers or his chief clerk has jurisdiction to order the production without anything being said about it in the judgment (*c*). Thus, a creditor who has come in under a decree for administration, and alleges that the executors have documents which would prove his debt, on making out a *prima facie* case of its existence, is entitled to an affidavit by the executors of documents *relating to his claim (d)*, if there are grounds for supposing that there is a *bona fide* one although not established (*e*), and is liable in turn to give discovery at their requisition (*f*). There may be cases, it is said, in which it

(h) See Hare, Part III., Chap. V., § 2—3; Kerr, pp. 11—12.

(i) Ord. XXXI. r. 11. Discovery after judgment is part of that "very large body of practice unprovided for by the rules" mentioned by Jessel, M. R. (8 Q. B. D. 145).

(k) See *Salt v. Cooper*, 16 Ch. D. 544. The corresponding section of the Chancery Procedure Act, 1852 (15 & 16 Vic. c. 86, s. 18), was held to apply to applications for production after as well as before decree (*Richards v. Walkins*, 6 Jur. N. S. 168). See also *Saxby v. Easterbrook*, L. R. 7 Ex. 207, and *Holland v. Fox*, 3 E. & B. 977 (at common law).

(a) See *Rowcliffe v. Leigh*, C. A., 6 Ch. D. 256 (Ord. XXXI. r. 19 applied).

(b) *Post*, pp. 26 *seq.*

(c) Seton, 64. See *per Stuart*, V.-C., 39 L. J. Ch. 828.

(d) *Re M'Veagh's estate*, 1 De G. J. & S. 399.

(e) See *per Kindersley*, V.-C., 13 W. R. 1014.

(f) See *Rowcliffe v. Leigh*, *ubi supra* (where the production was postponed for want of immediate materiality).

would be right to refuse an order for production by the executor, but it would be a very strong case indeed which would induce the Court to do so, as it would be without the full materials necessary for deciding the case (*g*), and it is just that an executor or administrator should assist a claimant who seems to have a reasonable case (*h*). A person claiming to be one of the next of kin of an intestate who requires discovery of documents from the administrator should not serve him with a *subpœna duces tecum* to produce them, but should apply for an affidavit of documents *relating to his claim* (*i*). An affidavit of documents may be ordered after judgment, although the party from whom it is sought has been interrogated as to documents, or made an affidavit of documents previously, without any objection being taken thereto; but, in such case, it should be confined to documents *other than those previously disclosed* (*k*). A claimant is only entitled to see such documents as would *tend to establish his title*, and where there are several claimants, none of them has a right to see the evidence adduced by another, and the principle is the same where the conflict is between a single claimant and the legal personal representative (*l*). The discovery sought must be such as is required by the exigencies of the judgment or order, and useful for carrying it into effect; no party can of right examine another party, except for the purposes of the judgment or order; he cannot do so for merely collateral purposes, *e.g.*, for the purposes of some ulterior suit (*m*). If it is sought to administer interrogatories, they must be approved of, or, if need be, settled, by the Chief Clerk or Master (*mm*), and leave must be obtained to administer them (*n*). They must be relevant to the accounts or other inquiries directed to be taken by the judgment or decree (*o*), and be such as fairly arise out of it (*p*). Thus, under an ordinary decree for an account in an administration suit, a residuary legatee was not allowed to interrogate an

Extent of right
to discovery.

Limited by
judgment or
order.

(*g*) See *per* Turner, L. J., 32 L. J. Ch. 525.

(*h*) See *per* Kindersley, V.-C., 11 Jur. N. S. 596.

(*i*) *Newland v. Steer*, 11 Jur. N. S. 596.

(*k*) *Hanslip v. Kilton*, 1 De G. J. & S. 440; *Richards v. Watkins*, 6 Jur. N. S. 168.

(*l*) See *Newland v. Steer*, 11 Jur. N. S. 596, *per* Kindersley, V.-C.

(*m*) See *Cottingham v. Earl of Shrewsbury*, 3 Ha. 627, 638.

(*mm*) Dan. 1061; *v. ib.*, as to the practice generally in such cases.

(*n*) See Ord. XXXI. r. 1.

(*o*) *Williams v. Douglas*, 6 Jur. 1010.

(*p*) *Small v. Attwood*, 2 Y. & C. 101; See *Pearse v. P.*, 1 De G. & Sm. 12.

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executor and co-defendant as to alleged breaches of trust (*q*). The party desiring to interrogate may be required, as a preliminary condition, to bring in a statement of facts supported by evidence, or make an affidavit verifying the facts to which the interrogatories are directed (*r*). If necessary, further interrogatories may be administered, but where a full answer has been obtained the party cannot exhibit fresh interrogatories, not for the purpose of carrying out the judgment, but of contradicting the answer already sworn (*s*). The mere circumstance that a rule *nisi* for a new trial is pending is not a sufficient ground for granting discovery after verdict (*t*), unless there has been fraudulent or inequitable conduct on the part of the litigant from whom it is sought (*u*); *a fortiori*, therefore, it will not be granted to enable an unsuccessful suitor to see if he has grounds for moving for a new trial (*x*). Discovery has been granted in Chancery in aid of executions to ascertain where the judgment debtor's property was situated (*y*).

Procedure by
summons at
chambers.

The procedure is the same as before judgment, *viz.* by summons at chambers (*z*); but the summons for discovery of documents should not require a disclosure of documents *generally*, but should specify particularly the matters as to which discovery is required (*a*). The discovery will be given notwithstanding the fact that an appeal against the judgment is pending (*aa*).

Obtainable
between co-
defendants.

After judgment for an account, the ordinary rules as to the parties as between whom discovery is obtainable do not apply, because all the parties are then *co-actors* in the action, *i.e.* legally interested in the taking of the account

(*q*) *Ford v. Bryant*, 9 Beav. 410; *Hopkinson v. Bagster*, 1 Y. & Coll. Ch. 13.

(*r*) *Sidden v. Forster*, 1 S. & S. 335; *Winter v. W.*, 1 Jur. 754; *Small v. Atwood*, 2 Y. & C. 101.

(*s*) See *Suckermore v. Dimes*, 9 Beav. 518.

(*t*) *Whitmore v. Thornton*, 3 Price, 241, 248; Hare, 81 *seq.*

(*u*) Hare, *ib.*; Mitf. [131.]

(*x*) *Pratt v. Goswell*, 9 C. B. N. S. 706. See as to discovery in the Court of Appeal, *post*, p. 177.

(*y*) Hare, 84, and cases there cited. In the Common Law Courts such discovery was refused as not being authorised by the C. L. P. Act, 1854, ss. 50—1 (*Hayne v. Pratt*, L. R. 6 C. P. 104).

(*z*) See Ch. Cons. Ord. XLII. r. 4; Dan. 1064—5; *Richards v. Watkins*, 6 Jur. N. S. 168. Rule 19 (postponing discovery) may be applied (see *Rowcliffe v. Leigh*, C. A., 6 Ch. D. 256).

(*a*) Dan. 1682—3; *Haldane v. Eckford*, L. R. 7 Eq. 425; *Re M'Veagh's estate*, 1 De G. J. & S. 399; but see *Kennedy v. Wakefield*, 39 L. J. Ch. 827.

(*aa*) *Saxby v. Easterbrook*, L. R. 7 Ex. 207.

or inquiries by which they will be charged or bound (b), and the Court proceeds upon an ascertained view as to their rights (c), so that discovery is obtainable as between *co-defendants*, where any questions are raised as between them (d). Thus, a residuary legatee after a decree for the administration of an estate may get discovery from the executor in order to test the accuracy of the latter's accounts, though a co-defendant (e).

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(b) See *per Wigram*, V.-C., 15 L. J. Ch. 445.

(c) *Per Stuart*, V.-C., 4 Giff. 405; *Hart v. Montefiore*, 30 Beav. 280.

(d) *Kennedy v. Wakefield*, 39 L. J. Ch. 827. *Re M'Veagh's estate*, 1 De G. J. & S. 399. See *Cottingham v. Lord Shrewsbury*, 3 Ha. 627.

(e) *Re M'Veagh's estate*, *supra*.

CHAPTER IV.

OBJECTIONS TO DISCOVERY.

SECT. 1.—*Of the objection that the discovery is immaterial(a).*

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Immateriality.

THERE are three senses in which discovery may be said to be immaterial. It may be (1) *immaterial as regards the action or proceedings generally* (which is the ordinary sense of the word), or (2) *as regards the persons from whom the discovery is sought*, or it may be (3) *immaterial at the time when it is sought* (b). This third species of immateriality will be discussed hereafter under a separate head, and of the second, it is sufficient to say that, in general, a party is only obliged to answer such of the interrogatories as are necessary to enable the party seeking discovery to obtain a complete judgment *against him individually* (c), one set of defendants not being bound to answer questions upon the cases of other defendants (d), and if a party should unnecessarily and vexatiously require another party to answer interrogatories, he may be ordered to pay the costs occasioned thereby (e). It only remains therefore to consider the objection in the ordinary sense in which the term immateriality is used, *i.e.*, as synonymous with *irrelevancy* (f).

Irrelevancy.

The late Sir James Wigram, in his work on discovery (g), lays it down as his second proposition that "It is the right, as a general rule, of a plaintiff in equity to exact from the defendant a discovery of *all matters of fact* which, being

(a) See Hare, Part III., Ch. 2, §§ 2—4 ; Kerr, Part II., Ch. 6, § 3.

(b) Hare, 138 ; Dan. 625 ; *v. post*, p. 28 (*Postponing discovery*).

(c) W. pl. 235 ; Hare, 141 ; see *Marsh v. Keith*, 1 Dr. & Sm. 342. By Ord. XXXI. r. 1, a note must be appended to the foot of interrogatories stating which of them each of the persons interrogated is required to answer to (*cf.* Ch. Ord. Aug. 1841, No. 17).

(d) *Tomlinson v. Swinnerton*, 2 Jur. 393.

(e) See *Cocks v. Stanley*, 6 W. R. 45.

(f) See Hare, 137.

(g) Pl. 26.

well pleaded in the bill, are *material to the plaintiff's case* about to come on for trial, and *which the defendant does not by his form of pleading admit.*" In ordinary cases where the giving of the discovery is comparatively a matter of indifference to the party called upon to do so, the objection will not be allowed except in a case of *clear immateriality* and not merely of *doubtful materiality* (h), for it is enough if the discovery is or *may* be material towards proving the party's case or even the smallest tittle of it (i). There should be a full discovery of anything which is *reasonably material* to the case of the party seeking it, and which may be produced without any overwhelming amount of injury to the party giving it (k). "The Court does not," it has been said, "when discovery is a matter of indifference to the defendant, weigh in golden scales the question of materiality or immateriality" (l), and a certain latitude must always be allowed in seeking it, as it is almost impossible for the Court, at that stage, to determine what propositions will be material to the case of one or other of the parties (m).

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Slight degree
of relevancy
sufficient.

Where, however, the nature of the discovery required is such that the party obtaining it may, though failing at the hearing, afterwards use it in a way prejudicial to the party giving it, the Court will take into consideration the special circumstances of the case, and, whilst, on the one hand, it takes care that the party seeking it obtains all the discovery which can be of use to him, on the other it is bound to protect the other party against undue inquisition into his affairs (n). If production is likely to be injurious to the party producing, and not beneficial to the party to whom the production is made, those are very good reasons why it should not be ordered (o). The Court will also exercise a proper

Except where
discovery op-
pressive or
injurious.

(h) See *Tipping v. Clarke*, 2 Ha. 383, 390, *per* Wigram, V.-C.; *Agar v. Regent's Canal Co.*, Coop. Ch. C. 212.

(i) See *per* Kindersley, V.-C., 35 L. J. Ch. 401, 4 Drew, 252, 17 Sim. 214; Mitf. [193]. See *Shepard v. Lord Lonsdale*, C. A., 42 L. T. 172, where Brett, L. J., said, "unless we can say that the answers cannot be relevant, we cannot disallow these interrogatories."

(k) See *per* James, L. J., in *Carver v. Pinto Leite*, L. R. 7 Ch. App. 90, 97. (l) *Per* Lord Hatherley, L. C., in *Moore v. Craven*, *ib.* 94, 96; see *per* Wigram, V.-C., 2 Ha. 390; *Carver v. Pinto Leite*, *supra*.

(m) See *per* Selwyn, L. J., L. R. 4 Ch. App. 678; *per* Lord Romilly, M. R., 33 Beav. 271.

(n) See *per* Lord Hatherley, L. C., *ubi supra*; *G. W. Coll. Co. v. Tucker*, L. R. 9 Ch. App. 376; *Drake v. Symes*, Joh. 647.

(o) See *per* Malins, V.-C., L. R. 19 Eq. 45; *Moore v. Craven*, *ib.* 7 Ch. App. 94 n.; *Carver v. Pinto Leite*, *ib.* 90.

CHAP. IV. control over any attempt to press for any such *minuteness of discovery* as would be either *vexatious or unreasonable*, as indeed it can do in every case in which it is satisfied that any kind of discovery is required vexatiously or oppressively (*p*). "In determining," says Sir James Wigram, "whether particular discovery is material or not, the Court will exercise a discretion in refusing to enforce it, where it is *remote in its bearings* upon the real point in issue, and would be an oppressive inquisition" (*q*). Thus, in an action by a firm of horse dealers for the price of horses sold by them, the Court refused to enforce an answer to interrogatories asking whether they were the real owners of the horses, the circumstances under which they were in possession of them, and the dates at which they received possession of them, as being unreasonable and too remote (*r*).

Vexatious and remote discovery.

Relevancy tested by pleadings and evidence.

Right to relief assumed.

(*p*) See *Elmer v. Creasy*, L. R. 9 Ch. App. 69, 73 seq.; *Drake v. Synnes*; *G. W. Coll. Co. v. Tucker*, *ib.*, 376; *Sheward v. Lord Lonsdale*, 5 C. P. D. 47; *Janson v. Solarte*, 2 Y. & C. 127.

(*q*) Pl. 238.

(*r*) *Sheward v. Lord Lonsdale*, 5 C. P. D. 49; *S. C.*, 42 L. T. 172, C. A.

(*s*) *Anon.*, W. N. 1876, 39; *per* Lord Hatherley, L. C., L. R. 7 Ch. App. 97; *Duncombe v. Davis*, 1 Ha. 184; W. Pl. 224—6.

(*t*) *Hodsoll v. Taylor*, L. R., 9 Q. B., 79. See *Millington v. Loring*, C. A., 6 Q. B. D. 190. Evidence may be given at the trial of (1) facts in issue, and (2) facts relevant thereto (see Steph. Ev. p. 4), and where there are no pleadings, any facts from the establishment of which the existence, non-existence, nature, or extent of any right, liability, disability asserted or denied in such case would follow are "facts in issue" (*ib.*). According to the recent case of *Millington v. Loring* (*supra*) any facts which can be given in at the trial, e.g., matters which go to aggravate or diminish the damages recoverable, are material, but, in general, evidence of collateral facts incapable of affording any reasonable presumption as to the existence or non-existence of the facts in issue or dispute is inadmissible (Tayl. Ev. § 290).

(*u*) *Smith v. Berg*, 36 L. T. 371.

discovery it will be assumed that the party will ultimately be found to be entitled to the relief which he seeks (*x*), since otherwise it would come too late to be of any use to him, and that the relief is properly asked (*y*). In the case of interrogatories, the test of the materiality of a particular question, is the service which it would be to the party interrogating if admitted or answered in the affirmative (*z*), and the *probability* or otherwise of getting the particular answer sought is not the question (*a*); the point is, whether the interrogatory, if answered in a particular way, would not have the desired effect (*b*).

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Test is service which answer would be to party interrogating.

It is not necessary that interrogatories should be such that the answers would be admissible in evidence for the party interrogating, if there is a reasonable probability of his deriving material benefit from them in the action (*c*). In like manner it is no ground for objecting to produce documents that they would not be evidence for the party calling for the production (*d*).

Facts discovered need not be evidence.

Interrogatories put by way of cross-examination with a view of discrediting the party interrogated are considered irrelevant, although such questions might be put to the party at the trial, the right of interrogating not being identical with that of cross-examination (*e*); thus, a party will not be required to go through his books for a number of years for the purpose of giving an answer which could only be used to discredit him if he made an erroneous statement (*f*), and an interrogatory asking a party whether statements in his pleadings are true or false is improper (*g*). Similarly, it is no ground for ordering inspection of documents that they might afford useful materials for cross-examination, or might be used for the purpose of creating a prejudice (*h*).

Discovery not allowed for purpose of cross-examining or discrediting.

It is not necessary that interrogatories should be based

Interrogatories need not be

(*x*) *Gresley v. Mousley*, 2 K. & J., 288; see *per Kindersley*, V.-C., 1 Drew. 506, 5 W. R. 877; 1 *ib.* 39; *per Wigram*, V.-C., 1 Ha. 189.

(*y*) See *per Knight Bruce*, V.-C., 26 L. J. Ch. 454; 8 De G. M. & G. 730. It seems that this assumption should be made *à fortiori*, now that defences are no longer made on oath.

(*z*) *Ghadwick v. C.*, 22 L. J. Ch. 329; *Bally v. Kenrick*, 13 Price, 291.

(*a*) See *per Selwyn*, L. J., L. R. 4 Ch. App. 678.

(*b*) *Per Lord Cottenham*, L. C., 2 H. & T. 22.

(*c*) See *per Blackburn*, J., 11. W. R. 573.

(*d*) *V. post*, p. 112.

(*e*) See *per James*, L. J., 3 Q. B. D. 661; *Baker v. Newton*, W. N. 1876, 8.

(*f*) See *per Jessel*, M. R., 18 Ch. D. 484.

(*g*) *Johns v. James*, 13 Ch. D. 370.

(*h*) *Richards v. Gellally*, L. R. 7 C. P. 127.

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based on
specific
charges.

upon some specific charge or statement made in the pleadings of the party interrogating, provided they relate to matter which is pertinent, and may be material to the case made by the pleadings, and are founded on the general allegations thereof (*i*). A single allegation of a fact in a pleading is sufficient to found upon it all questions which go to prove the truth of the fact (*k*); thus, under an allegation of the payment of money, the time, place, mode, and other circumstances of the payment may be asked, and under an allegation of the existence of a partnership, an answer may be obtained to every collateral circumstance charged as evidence of the general fact (*l*).

Interrogatories
unreasonably
wide and
sweeping.

It frequently happens that interrogatories are objectionable, as being too wide in their scope, and opening up too remote a field of inquiry (*m*), or too onerous (*n*), rather than that they are wholly irrelevant. When such is the case, if the party interrogated would have been liable to answer the question if its generality had been properly limited, he should treat it as so limited, and answer it accordingly, leaving the interrogating party to enforce a full answer if he can (*o*).

SECT. 2.—*That the discovery sought is not immediately material.*

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Action comprising subordinate issues or questions.

An action often comprises several distinct issues or questions of fact, of which one is a *principal* or *fundamental*, and the other or others *subordinate* or *consequential* issues or questions, incapable of affecting in any way the determination of the main issue, and such issues or questions will ordinarily come on for trial *simultaneously*, though they may be adjudicated on successively, thus conferring upon the parties a *prima facie* right to the immediate discovery of all matters material to the determination of each and every of them, subordinate as well as principal (*p*). Such are those actions

(*i*) See *M'Garel v. Moon*, L. R. 10 Eq. 22; *Girdlestone v. North British Merc. Ins. Co.*, 11 *ib.* 197.

(*k*) *Hare*, 244; see *per* Lord Eldon, L. C., 11 Ves. 376.

(*l*) See *per* Leach, V.-C., 6 Madd. 63; *Robson v. Crawley*, 2 H. & N. 766.

(*m*) See *Robson v. Crawley*, *supra*.

(*n*) See *Simpson v. Charlesworth*, 14 L. T. 699.

(*o*) See *Parker v. Wells*, C. A., 18 Ch. D. 477; *Smith v. Berg*, 36 L. T. 471; *v. post*, p. 89.

(*p*) W. Pl. 148. Such are suits for infringement of patents (see *Swinborne v. Nelson*, 16 Beav. 416; *De la Rue v. Dickinson*, 3 K. & J. 388; *Lett v.*

(most commonly occurring in the Chancery Division) in which some right, title, or character is asserted by one of the parties, (and denied by the other,) and an *account* or other *consequential relief*, or right of inspection (*pp*) claimed as incidental thereto, the right to such relief wholly depending upon the determination of the issue as to the existence of the right or title, or where a claim for an account is met by a defence of an account stated or a release (*q*). In such cases, the question frequently arises, whether the party asserting a disputed right or title, is entitled to discovery *before the hearing of the action* of matters which are *material only to the proof of the amount or extent of the consequential relief* to which he will be entitled if he establishes his principal contention, and therefore wholly incapable of assisting the Court in the determination of the main question (for if they be in any degree so capable, *e.g.*, in determining the right to an account, there is no doubt that they must be discovered immediately (*r*), unless asked for in an oppressive form), or whether the Court will protect the party from whom the discovery is sought from disclosing, before the hearing, what may eventually prove to be his own private affairs (*s*).

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The Courts of Equity were very strict in enforcing full discovery from a defendant in such cases (*t*); the rule, founded partly on technical grounds of pleading, and partly on substantial grounds, being, that a defendant who submitted to answer (even when he denied the plaintiff's title), must answer fully, not only as to other matters, but also as to consequential matters of account, unless he could make out an exceptional case for not doing so, viz., that the discovery was sought *vex-*

Rule in
Chancery that
defendant who
answered must
answer fully.

Parry, 1 H. & M. 517; *Carver v. Pinto Leite*, L. R. 7 Ch. App. 90), for administration (see *Adams v. Fisher*, 3 Myl. & Cr. 526), redemption (see *Elmer v. Creasy*, L. R. 9 Ch. App. 69), suggesting a partnership (see *Clegg v. Edmondson*, 22 Beav. 125, 142; *Mansell v. Peeney* (No. 2), 2 J. & H. 320; *Turney v. Bayley*, 4 De G. J. & S. 332), or agency (see *Moore v. Craven*, L. R. 7 Ch. App. 94 n.; *G. W. Coll v. Tucker*, 9 ib. 376).

(*pp*) See, as to the rule in the case of title-deeds, *per Kindersley*, V.-C., 17 Sim. 215—6.

(*q*) See W. pl. 51; *Wier v. Tucker*, L. R. 14 Eq. 25; *Kay v. Hargreaves*, W. N. 1866, 122.

(*r*) See *Lockett v. L.*, L. R. 4 Ch. App. 336; *Harris v. H.*, 4 Ha. 179; *A. G. v. Thompson*, 8 ib. 115; *Ord v. Fawcett*, 19 L. J. Ch. 487; *Stainton v. Chadwick*, 3 Macn. & G. 575. The distinction is well illustrated by a comparison of *Harris v. H.*, with *Adams v. Fisher*, 3 Myl. & Cr. 526 (see *per* Wigram, V.-C., 8 Ha. 114).

(*s*) See *per* Wood, V.-C., 2 J. & H. 323; *per* James, L. J., 43 L. J. Ch. 520; *Heugh v. Garrett*, 44 ib. 305.

(*t*) See *per* Lord Selborne, L. C., L. R. 9 Ch. App. 69; *per* Wood., V.-C., 1 H. & M. 516.

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Discretion as to granting discovery of accounts before trial.

ationously or *oppressively*, or was discovery which it would be burdensome or injurious to give, and which probably might never be used at all (*u*). The Court, however, in its discretion, was in the habit of drawing a line between *accounts* which were necessary for the decision of questions which might occur at the hearing, and those which could in no event be required until the judgment came to be worked out, and could have no bearing on the issue in the action (*x*), as in cases of alleged partnership or agencies, or actions for infringement of patents, where the partnership or infringement was denied, and the discovery could not affect the question whether the plaintiff was an agent or partner or not, or whether or not there had been an infringement (*y*); again, where the questions of liability generally and of damages were severable, discovery which was material to the latter question only, would not be given before the hearing (*z*).

Jud. Acts give express discretion to postpone discovery.

The Judicature Acts have not only done away with the technical rule above-mentioned (*a*), but have expressly recognised the absence of immediate materiality as a reason for objecting to answer interrogatories (*b*), and further they expressly vest in the Court a discretion as to *postponing* discovery in such cases until the determination of the prior issues or questions (*c*), a discretion which will be exercised by refusing the discovery before the trial, where it would be *unfair and oppressive* to compel the opposite party to give it (*d*).

(*u*) *Elmer v. Creasy*, L. R. 9 Ch. App. 69 (see *per James*, L. J., 7 *ib.* 97); *Saull v. Browne*, *ib.* 364, 367—8; *G. W. Coll. Co. v. Tucker*, *ib.* 376; *Carver v. Pinto Leite*, 7 *ib.* 90; *Moore v. Craven*, *ib.* 94 *n.*; *Heugh v. Garrett*, 44 L. J. Ch. 305; *Republic of Costa Rica v. Erlanger*, *ib.* 281; *Lea v. Saxby*, 32 L. T. 731.

(*x*) See *per Lord Hatherley* (when Wood, V.-C.) 2 J. & H. 316—7, 323; 1 H. & M. 516; L. R. 5 Ch. App. 576; *Moore v. Craven*; *Heugh v. Garrett*; *Mansel v. Feeney* (No. 2), 2 J. & H. 320; *post*, p. 30.

(*y*) *Ib.* In any case where the discovery was postponed or refused under the former practice before the hearing it would, *a fortiori*, be postponed under the present practice.

(*z*) *Elkin v. Clarke*, 21 W. R. 447; *Turney v. Bayley*, 4 De G. J. & S. 332; see also *Lett v. Parry*, 1 H. & M. 517.

(*a*) See *per Lindley*, J., W. N. 1876, 12.

(*b*) See Ord. XXXI. r. 5.

(*c*) Ord. XXXI. r. 19 (*post*, p. 204). This rule applies to the case of discovery *after judgment* (*Rovcliffe v. Leigh*, C. A., 6 Ch. D. 256). See Ord. XXXVI. r. 6, as to trying issues out of their turn. The objection can be taken and the question raised equally well in the answer or affidavit (*Parker v. Wells*, C. A., 18 *ib.* 476).

(*d*) *Parker v. Wells*, *supra*; *Hemery v. Worssam*, C. A., 26 Sol. Journ. 296.

The rule in question, which was styled by James, L.J., "one of the most wholesome rules introduced by the Judicature Act" (e), provides, that "If the party from whom discovery of any kind or inspection is sought objects to the same or any part thereof (f), the Court or Judge may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the action, or that for any other reason it is desirable that any such issue or question should be determined before deciding upon the right to the discovery or inspection (g), order that such issue or question be determined first, and reserve the question as to the discovery or inspection" (h). Accordingly, the modern rule is, that *where the title is absolutely denied, discovery, which could only be of use if the title is established, will not be ordered at once where it would be oppressive to the defendant to order it* (i). "In deciding whether discovery ought to be given," said the Master of the Rolls in a recent case, "we must first consider whether it will help the plaintiff at the trial. If it will not, but will only be of use if the plaintiff obtains a decree, then, having regard to the discretion given to the Court by Order XXXI., r. 19, we must consider whether it is fair that the defendant should be obliged to give it at this stage of the proceedings, or whether to compel him to give it would be oppressive" (k).

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Ord. XXXI.
r. 19.

Rule since
Jud. Act.

Thus, in a claim under a decree for the administration of an estate, where the main question in dispute was whether the claimant had sold for the testator as his agent on commission or on his own account, discovery of the amounts received by him in respect of such sales was postponed, as being immaterial to the issue as to what was the agreement or course of dealing between the parties (l), Lord Justice James remarking that no discovery should be taken from a defendant unless it was *really relevant* to the issue first to

No discovery
given unless
really relevant
to issue first
to be tried.

(e) 6 Ch. D. 263.

(f) This refers to an objection in the answer or otherwise that the discovery sought is not sufficiently material at the then stage of the action (v. Ord. XXXI. r. 5).

(g) See *De La Rue v. Dickinson*, 3 K. & J. 388 (infringement of patent).

(h) Ord. XXXI. r. 19. Mixed questions of law and fact are within this rule (see *per* Lindley, J. in *Tasm. Ry. v. Clark*, 27 W. R. 677).

(i) See *per* Jessel, M. R., in *Parker v. Wells*, C. A., 18 Ch. D. 476, 482.

(k) *Per* Jessel, M. R., 18 Ch. D. 483; see *per* Cotton, L. J. *ib.* 486-7.

(l) *Rowcliffe v. Leigh*, C. A., 6 Ch. D. 256; cf. *G. W. Coll. Co. v. Trucker*, L. R. 9 Ch. App. 376; *Vermineck v. Edwards*, 29 W. R. 189.

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be tried (*m*); and where a contract to pay commission was set up, and denied by the defendant, the issue as to the existence of the alleged contract was ordered to be tried first, and discovery dependent upon the decision of that issue refused, as not being material until the contract had been proved (*n*). The Court will not compel a defendant to give discovery of his own private means and transactions on the speculation that the plaintiff may afterwards want it, if at the hearing he succeeds in the preliminary proposition that the defendant was or is an agent. It would be monstrous that a man, by merely alleging that he had a share in a concern, which allegation was denied and had not been established, and whilst it was doubtful whether it would be established, could get the accounts of a defendant's private business, and of his dealings with other people (*o*).

Rule as to
discovery of
account.

In actions where an *account* forms part of the relief prayed, the Court has a discretion as to requiring a party to answer as to the result of the account before the trial (*p*). "There are cases in which the account would be complicated, and in which the plaintiff's title is denied, in which it would be refused (*pp*). There are cases in which the plaintiff's title to it may be denied as a title which is fairly open to trial, and which has to be affirmed at the trial, and in which the giving of the accounts would occasion little trouble to the defendant and would be of immense advantage to the plaintiff, by enabling him to adopt the account as rendered by the defendant (*q*), and get an immediate decree or order at the trial without the trouble and expense of a reference for that purpose, where the Judge in the exercise of his discretion may allow it" (*qq*). In many cases an admission that profits have been made generally during the period in question is sufficient before the trial. Accordingly, in an action to enforce an alleged trust in respect

(*m*) *Ib.* 263.

(*n*) *Wood v. Angl. Italian Bk.*, 34 L. T. 255; *Flower v. Lloyd*, 20 S. J. 584, 703.

(*o*) See *G. W. Coll. Co. v. Tucker*, L. R. 9 Ch. App. 375, 378, *per James*, L. J.; *Heugh v. Garrett*, 44 L. J. Ch. 305.

(*p*) See *Parker v. Wells*, C. A., 18 Ch. D. 476; *Hemery v. Worssam*, C. A., XXVI. S. J. 296.

(*pp*) *E.g.*, an account of the *profits* made by the employment of a particular sum in a business (see *per Jessel*, M. R., 18 Ch. D. 484; *Hemery v. Worssam*, *supra*; see also *Lockett v. L.*, L. R. 4 Ch. App. 336).

(*q*) See *Saunders v. Jones*, C. A., 7 Ch. D. 435; *Clegg v. Edmundson*, 22 Beav. 125; *Robson v. Flight*, 33 *ib.* 268; *Elmer v. Creasy*, L. R. 9 Ch. App. 69; *Great Luxembourg Ry. v. Magnay*, 23 Beav. 646.

(*qq*) *Per Jessel*, M. R., 16 Ch. D. 98.

of monies deposited with the defendant, the defence being a denial of the trust and that the monies had been paid out by the depositor's directions, discovery as to (1) the dates and particulars of such payments, and (2) the profits arising from the employment of the trust monies, was refused before the trial on the ground that it would be useless at that stage and oppressive (*r*), and the Master of the Rolls disposed of the stock argument that the discovery might enable the plaintiff, if successful, to take an immediate order for payment of the sum admitted by the defendant, by saying that a defendant never makes such an admission of *profits* as the plaintiff could use for that purpose (*s*). Again, in an action to set aside the sale of a share in a business, on the ground of gross undervalue, which was denied, discovery of the profits made therein *since the date of the sale* was refused on the ground that it would not help the plaintiff in obtaining a decree, as it would not be evidence of the profits at the time of sale, and would be oppressive to the defendant (*t*), and the Master of the Rolls said that the question must be decided, not with reference to the old practice of the Court of Chancery, which in this respect greatly needed alteration, but with reference to Rule 19, and that he adhered to what he said in *Parker v. Wells* (*u*), that the mere fact that the discovery sought might enable a plaintiff to obtain an immediate decree would not be a sufficient reason for requiring the defendant to set out long and intricate accounts, or the result of long and intricate accounts.

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In addition to that above noticed, there may be another reason for granting the discovery, viz., that if it were postponed, the party seeking it would run a risk of losing it altogether by the death of the other party or other supervening accident (*x*), a reason which is less applicable to the case of the discovery of documents than to discovery by answer (*y*). Again, by obtaining the discovery at an early stage of the action, the party may satisfy himself that it is not worth prosecuting (*z*),

Exceptions to the rule :
1. Where danger of losing the discovery.

- (*r*) *Parker v. Wells*, C. A., 18 Ch. D. 477.
- (*s*) *Ib.* 484—5.
- (*t*) *Hemery v. Worssam*, C. A., XXVI. S. J. 296.
- (*u*) 18 Ch. D. 477.
- (*x*) See *per* Lord Selborne, L. C., L. R. 9 Ch. App. 72 ; *per* Turner, V.-C., 22 L. J. Ch. 331 ; W. pl. 163.
- (*y*) See *per* Wigram, V.-C., 8 Ha. 115.
- (*z*) W. pl. 163 ; see *per* James, L. J., in *Benbow v. Low*, C. A., 50 L.J. Ch.

CHAP. IV. or that he has been labouring under a mistake as to his
Sect. 2. rights.

2. In admin-
 istration
 actions.

In the case of administration actions against trustees, executors, or administrators, the right to a full account by answer of the personal estate of the testator or intestate still exists (*a*), unless asked for vexatiously (*aa*). In such cases discovery at that stage is important in order that the plaintiff may have the opportunity of (1) requiring the balance of the estate to be brought into Court for protection, and (2) of being satisfied by the oath of the executor as to the true state of the accounts (*b*), and of discontinuing the action safely, if after discovery he thinks it desirable (*c*).

3. Other cases. Where the title of the party seeking the discovery to the relief claimed is admitted, his opponent cannot refuse to give it (*d*), and if the Court could give complete relief at the trial without directing an account, there is no reason for postponing it (*e*). In common law actions, as the party is bound to prove his whole case at the trial, and it is not usual to direct a subsequent account, he should be allowed any discovery necessary to enable him to prove what is due to him (*f*). Where the objection is raised as a reason for not producing documents, the affidavit should deny that they show or tend to show how the main issue or question is to be decided (*g*).

This objection might also be raised in cases where discovery is *prematurely* sought (*h*), but, in the case of *interrogatories*, the better course is to apply to set them aside as having been exhibited "unreasonably or vexatiously" (*i*).

35, 39; *per* Bacon, V.-C., 7 Ch. D. 446; *Re Sutcliffe*, 44 L. T. 547; *Brookes v. Boucher*, 31 L. J. Ch. 821; *per* Wood, V.-C., 1 H. & M. 516.

(*a*) See *Re Sutcliffe*, 44 L. T. 547; W. pl. 170.

(*aa*) See *per* Lord Hatherley, L. C., in *Thompson v. Dunn*, L. R. 5 Ch. App. 573.

(*b*) See *per* Lord Hatherley, L. C., *ubi supra*.

(*c*) See *per* Fry, J., in *Re Sutcliffe*, *ubi supra*; *per* Malins, V.-C., in *Cull v. Ingles*, 37 L. J. Ch. 385, 388; *per* Wood, V.-C., 2 K. & J. 391; *Brooks v. Boucher*, 31 L. J. Ch. 821.

(*d*) *Elmer v. Creasy*, L. R. 9 Ch. App. 69.

(*e*) See *Saunders v. Jones*, C. A., 7 Ch. D. 435, 446.

(*f*) See *per* Thesiger, L. J., *ib.* 452; W. pl. 159; *Elkin v. Clarke*, 21 W. R. 447.

(*g*) See *Dickson v. Harrison*, W. N. 1878, 145.

(*h*) *Mercier v. Cotton*, 1 Q. B. D. 442; *v. ante*, Chap. III.

(*i*) Ord. XXXI. r. 5; see *per* Pollock, B., 4 Q. B. D. 207.

SECT. 3.—*Of the objection that the discovery relates only to the opponent's case or title (k).*

The right of a plaintiff in equity to the benefit of the defendant's oath, is limited to the discovery of such material facts as relate to the "*plaintiff's case*," and does not extend to a discovery of the manner in which the "*defendant's case*" is to be exclusively established, or to evidence which relates exclusively to his case (*l*), for the rule of the court (which is most important and should be strictly adhered to) (*ll*) is that each party is to stand upon the strength of his own case, and is not entitled before the hearing to pry into that of his opponent (*m*). Owing to the terms in which the rule was originally stated, *viz.*, that a party had no right to see documents relating exclusively to his opponent's *title*, and the fact that the contest has usually been raised with regard to the production of *title-deeds and other muniments of title*, it has sometimes been supposed to apply peculiarly to such documents (*n*), but the use of the word "title" in this connection is ambiguous; the proposition ought to be that a party is not entitled to see any document that does not tend to make out his *case or his title to the relief sought* (*o*). There is no difference in this respect between the case of a plaintiff and a defendant (*p*); "There might, perhaps," said Lord Selborne

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Party not entitled to discovery of opponent's case.

Meaning of word "title."

Rule applies equally to plaintiffs and defendants.

(*k*) See Hare, part iii., ch. iv.; Kerr, part i., ch. vi., s. 4.

(*l*) See W. Prop. iii., pl. 23, 27, 242 *seq.*, Mitf. [190]. The right to such discovery, though not originally existing, may be conferred upon a party by his opponent (see W. pl. 346).

(*ll*) *Per* Jessel, M. R. 16 Ch. D. 98.

(*m*) See W. pl. 378; *Benbow v. Low*, C. A. 16 Ch. D. 93; *Owen v. Wynn*, C. A., 9 *ib.* 29.

(*n*) See *per* Wigram, V.-C., 8 Ha. 114; pl. 324.

(*o*) See *per* Kindersley, V.-C., in *Jenkins v. Bushby*, 35 L. J. Ch. 400, and in *Felkin v. Lord Herbert*, 30 *ib.* 750; *Clegg v. Edmunson*, 22 Beav. 125; *Bewicke v. Graham*, C. A., 7 Q. B. D. 400. The case of a mortgagor, which is supposed to stand on its own special circumstances, is, in fact, only one of the cases within the general rule. (See *per* Kindersley, V.-C., 4 Drew. 526). See, as to production of title-deeds by mortgagees, Coote (ed. 4) pp. 730 *seq.*; Fisher (ed. 3), pp. 309 *seq.*; *Chichester v. Lord Donegal*, L. R. 5, Ch. App. 497; *West of England Bank v. Nicholls*, 6 Ch. D. 613; *Republic of Costa Rica v. Erlanger*, L. R. 19 Eq. 33.

(*p*) See *Per* Lord Romilly, M. R., in *Commissioners of Sewers v. Glassey*, L. R. 15 Eq. 302, 304, 42 L. J. Ch. 346; W. pl. 378. The remarks of the Lords Justices in *Hoffman v. Postill*, L. R. 4 Ch. App. 673, 681, and *Boyd v. Petrie*, 20 L. T. 934, cited *post*, p. 39, must be taken with reference to the particular cases before them. (See *Commissioners of Sewers v. Glassey*, *ubi supra*).

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Party cannot
be asked how
he is going to
prove his
case.

in *Minet v. Morgan* (g), "be great reason for holding that if a man comes into court as a plaintiff, attacking somebody else, he ought to be bound to disclose everything on which he relies for the purpose of his attack. But that undoubtedly is not the present rule of the court." No party to an action is entitled to call upon his opponent to say how he intends to frame his case, or how he intends to argue it, upon the facts which are known to all (r), and the province of discovery is not to compel a party to set out in what manner he means to make out his case, or to deal with a certain set of materials, or whether he intends to dispute one proposition or another (s). [The plaintiff in discovery] has no right to say to the defendant, "Tell me what your title is—tell me what your case is—tell me the evidence you have to support it—disclose the documents you mean to make use of in support of it—tell me all these things, that I may find a flaw in your title" (t). Thus, in an action of trover by the assignees of a bankrupt to recover property alleged to form part of the bankrupt's estate, interrogatories asking the plaintiffs *upon what acts of bankruptcy they intended to rely in support of their title as assignees* were disallowed (u), and in such an action or an action for goods sold, the defendant is not entitled to interrogate the plaintiff as to how, when, and from whom he first became possessed of the goods in question (x), unless he admits a *prima facie* title in the plaintiff and *seeks to invalidate it by matter subsequent* (xx). Where the plaintiff set up a particular right, which would in part be established by evidence that it had actually been enjoyed, the defendant was not allowed to interrogate him as to the *particular instances in which that right had been exercised or enjoyed* (the acts themselves not being in issue but being only evidence bearing on the issue raised), although, as was said, he would have been entitled to discovery of *instances in which the right had been claimed and successfully resisted* (y).

(g) L. R. 8 Ch. App. 361, 364.

(r) See *per Romilly, M. R.*, in *Ingilby v. Shafto*, 33 Beav. 33, 39.

(s) *Ib.* 41.

(t) *Per Lord Abinger, C. B.* 4 Y. & C. 155.

(u) *Edwards v. Wakefield*, 6 E. & B. 462; see *Moor v. Roberts*, 2 C. B. N. S. 671.

(x) *Finney v. Forwood*, L. R. 1 Ex. 6; *Sivier v. Harris*, W. N. 1876, 22; *Sheward v. Lord Lonsdale*, 5 C. P. D. 47.

(xx) See *Derby Bank v. Lumsden*, L. R. 5 C. P. 107.

(y) *Commissioners of Sewers v. Glassey*, L. R. 15 Eq. 302 (see *per Thesiger*,

Where, however, there is a *privity* between the parties, as where a document forms the common title, or is the subject of the mutual and common right of both, as in the case of disputes between lords of manors and copyholders as to their mutual rights (z), or the applicant has otherwise an *interest* (a) in the evidence in the possession of his opponent, to prove his own case or defeat his adversary's, the rule does not apply, for what is evidence of the one's case, must be evidence of the other's; thus, even title-deeds may be ordered to be produced where it is *credibly*, and not merely generally or speculatively alleged that they *contain something supporting the case of the applicant, or impeaching that of his opponent* (b), or where they are *bond fide* sought to be *impeached for fraud* (c), or where the dispute is as to the *amounts or particulars of parcels*, or as to *boundaries* (d); e.g., where the applicant asserts that he is not within a certain boundary, as the deeds will show (e), or admits his opponent's title, and merely contends that it does not extend to the particular property in dispute (f). A party is not, however, upon a mere allegation of fraud, which is denied, entitled to the production of the impeached documents before the hearing (g); though, on the other hand, it is not necessary, in order to entitle him to the production, that his opponent should *admit* that

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Except where common title or case or interest in the documents.

Rule where fraud alleged.

L. J., 7 Ch. D. 451—2); *Bovill v. Smith*, 2 *ib.* 459; *Daw v. Eley*, 2 H. & M. 725.

(z) See *Warrick v. Queen's College*, L. R. 3 Eq. 683; *Minet v. Morgan*, 11 *ib.* 284, 286.

(a) See, as to what is meant by "interest," *post*, p. 130. A mere general allegation of such an interest, *without showing how it arises*, is not sufficient (*Philipps v. P.*, 40 L. T. 815; see *per* Wigram, V.-C., 1 Ha. 522—3, 584), and if the allegation be credibly denied, the case must be carried further (*ib.*).

(b) See *per* Lord Cottenham, L. C., 2 Macn. & G. 260; *per* Wigram, V.-C. 8 Ha. 113 *seq.*

(c) See *Patch v. Ward*, L. R. 13 Eq. 33.

(d) See *Jenkins v. Bushby*, 35 L. J. Ch. 400; *Lind v. Isle of Wight Co.*, 8 W. R. 540; *A. G. v. Thompson*, 8 Ha. 108; *Wright v. Vernon*, 1 Drew. 344; *Brown v. Wales*, L. R. 15 Eq. 142; *Ponsonby v. Hartley*, W. N. 1883, 13. The order for production may be limited to the parcels (see 8 Ha. 120; *Wayne's, &c. Co. v. Powells, &c. Co.*, W. N. 1880, 141, 159).

(e) *Burrell v. Nicholson*, 1 Myl. & K. 680; *A. G. v. Emerson*, C. A. 10 Q. B. D. 191.

(f) See *Earp v. Lloyd*, 3 K. & J. 549; *Bethell v. Casson*, 1 H. & M. 806. In such cases the discovery is not of title-deeds as such, but of the facts contained in *maps or plans* (*v. ib.*), or shewn by the recitals (see *per* Jessel, M. R., xxiv. S. J. 781).

(g) See *Bassford v. Blakesley*, 6 Beav. 131, 133, *per* Lord Langdale, M. R., (cited with approval by Malins, V.-C., in *Republic of Costa Rica v. Erlanger*, L. R. 19 Eq. 33, 45); *Crisp v. Platel*, 8 *ib.* 62; *Patch v. Ward*, *ubi supra*; W. pl. 311 *seq.*; *Swift v. M'ernan*, 13 Ir. Eq. Rep. 119.

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Party entitled
to know what
his opponent's
case is
generally.

Information
equivalent to
particulars.

there has been fraud (*h*). The Court must look to the circumstances of the case, and consider whether it is *reasonable* that the documents should be produced. There must be circumstances which show that the applicant is fairly entitled to have the matter inquired into (*i*). Such a case must be made as raises a doubt whether the plaintiff has not a right to impeach the deed (*k*). If the bill impeaches the deed, and alleges that there is anything *on the face of it* which will support the charge, the court will order it to be produced (*l*).

A party is, however, entitled to know generally *what his opponent's case is, its nature and character, and on what facts he relies* (*m*), that is, the *substantial particulars* of the acts on which he is going to rely, the *allegata probanda* (*n*), but not of the facts which are only evidence thereof (*o*), and may obtain by interrogatories such information with respect thereto as would be afforded by particulars, especially where the statement of the case in the pleadings is vague and general (*p*). He has a right to know what it is that the defendant relies upon, in order that he may meet and prepare himself to encounter such defence, but he has no right to say, "How do you make out your case? How do you prove it? What is your evidence?" (*q*). The question in such cases is, Is it in substance asking for better particulars, or an attempt to get at the evidence of the other side? (*qq*). It is a misapprehension to speak of such discovery as tending to destroy the case of the opposite party; it is directed to show what are the material issues—what are the

(*h*) See *per* Lord Langdale, M. R. 6 Beav. 133.

(*i*) *Ib*.

(*k*) See *per* Malins, V.-C., L. R. 19 Eq. 44—5.

(*l*) *Kennedy v. Green*, 6 Sim. 6.

(*m*) W. pl. 372; Kerr, 33. See *Saunders v. Jones*, C. A., 7 Ch. D. 435, as explained in *Benbow v. Low*, C. A., 16 *ib*. 93; *Ashley v. Taylor*, C. A., 38 L. T. 44. This has been pointed out as one of the functions of discovery (*v. ante*, p. 2).

(*n*) See *per* Brett, L. J., 4 Q. B. D. 133.

(*o*) See *Benbow v. Low*, C. A. 16 Ch. D. 93; *per* Cotton, L. J. 3 Ex. D. 337.

(*p*) *Johns v. James*, 13 Ch. D. 370; *Lyon v. Tweddell*, *ib*. 375. It seems, however, from the explanation given by Jessel, M. R., in *Benbow v. Low* (p. 97), of the decision in *Saunders v. Jones*, that such an interrogatory should only be allowed (1) in actions in the Chancery Division, and (2) where the party is interrogated for other purposes, and that in all other cases the information should be obtained, as before, by *particulars not on oath* (see *Augustinus v. Nerinckx*, C. A., 16 Ch. D. 18).

(*q*) *Per* Lord Cottenham, L. C. 2 H. & T. 13.

(*qq*) *Per* James, L. J., 50 L. J. Ch. 36.

material facts upon which, what may be called the subsidiary issues in the case, will be raised (r). Thus, in an action by a servant against his master for wrongful dismissal, there being a *general charge of misconduct* in justification, interrogatories were allowed as to the specific acts of misconduct relied on (s), and, in an action for libel, as to the facts intended to be relied on in support of a general defence of justification (t). By this means information may be obtained of the *dates, particulars, and circumstances* of the matters alleged by a party in his pleadings, and the *substance of conversations*, but not the details, (by which is meant, not that a man is not bound to state what took place at a particular interview, or the substantial details of a conversation which took place, but that he is not to be compelled under cover of interrogatories to disclose the evidence which he intends to adduce at the trial) (u), nor the names and addresses of those present at such conversations or interviews, and who will presumably be called by him as his witnesses (x), though it seems to be no objection *per se* that the discovery sought would *incidentally* disclose the names of the other party's witnesses (y). In actions for infringement of patents, discovery may be obtained by interrogatories of the particulars of alleged prior user relied on by the defendant, notwithstanding that there is a statutory provision for the delivery of such particulars (z). It is upon this principle, apparently, that interrogatories are now allowed as to the nature and extent of loss or damage sustained by the complainant (a), which were disallowed in the Common Law Courts except where the question was simply as to the amount of damages suffered, and the defendant was desirous of paying

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Substance of
conversations
relied on.

But not
names and
addresses of
witnesses.

Amount of loss
or damage.

(r) See *per* Thesiger, L. J., 38 L. T. 45.

(s) *Saunders v. Jones*, C. A., 7 Ch. D. 435, 446.

(t) *Gay v. Labouchere*, 4 Q. B. D. 206. Particulars of fraud, breaches of covenant, and infringement have always been obtainable in Common Law actions, and similar information may be obtained by means of interrogatories in the Chancery Division (see *per* James, L. J., 7 Ch. D. 449).

(u) *Eade v. Jacobs*, C. A., 3 Ex. D. 335, as explained by Cotton and Lindley, LL. JJ., in *A. G. v. Gaskill*, 20 Ch. D. 519, 529, 531; *Hills v. Watts*, L. R. 9 C. P. 688.

(x) *Eade v. Jacobs*; *Potter v. Metrop. Ry.*, 20 L. T. 281; *Daw v. Eley*, 2 H. & M. 725. See, however, *per* Bacon, V.-C., 13 Ch. D. 374.

(y) See *Kuhliger v. Bailey*, W. N., 1881, 165; *Storey v. Lord Lennox*, 1 Keen, 341, 1 Myl. & Cr. 525.

(z) *Birch v. Mather*, 22 Ch. D. 629; see 15 & 16 Vic. c. 83, s. 41; *post*, p. 170.

(a) See *Saunders v. Jones*, C. A., 7 Ch. D. 435; *Wills Canal Co. v. Swindon Waterworks Co.*, 20 W. R. 353.

CHAP. IV. money into court for the purpose of satisfying the plaintiff's claim and staying the action (b).
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Discovery of matter common to case of both parties.

It is no objection, if the discovery sought be material to the case of the party seeking it, that the disclosure may at the same time incidentally reveal matters upon which the other party relies in support of his case, as that which is common to the case of both may be inquired into by either (c). "To protect a defendant from the discovery or production of a document, relating to the subject of dispute, it is not sufficient that it should be evidence of his title, or contain evidence that he intends and is entitled to use in support of his case. *It may also be of a similar character with regard to the plaintiff's case, either in a directly affirmative manner, or by exhibiting matter at variance with the defence, or tending to impeach it*" (d). Thus, in an action for negligence against a surveyor or a solicitor, he may be asked *what steps he took to discharge his duties*, it being part of the plaintiff's case to make out that he did not do his duty, and of the defendant's that he did (e); and where the plaintiff sued as the holder of a particular office, and the defence was that he had not duly qualified himself by taking the necessary oaths, interrogatories as to whether he had done so and under what circumstances, were allowed (f).

Destroying opponent's case.

Discovery may be obtained of *matters tending to impeach or destroy an opponent's case*, although the case set up by the party himself may be merely a *negative one* (g), provided that case be definitely *alleged in the pleadings* (or by affidavit) and be one which, if established, would defeat his opponent's case (h). Thus, where the question was, as between the Crown and the lord of a manor, whether a certain foreshore

(b) *Horne v. Hough*, L. R. 9 C. P. 135; *Dobson v. Richardson*, ib. 3 Q. B. 778; *Wright v. Goodlake*, 34 L. J. Ex. 82; *Frost v. Brooke*, 32 L. T. 312; *Megaw v. M'Diarmid*, 10 L. R. Ir. 376.

(c) W. pl. 325, 344; see per Lord Campbell in *Whateley v. Crowter*, 25 L. J. Q. B. 163, 167 (S. C. 5 E. & B. 709); *Carew v. Davies*, ib. 165; *Bolton v. Corp. of Liverpool*, 1 Myl. & K. 91.

(d) *Per Knight Bruce*, V.-C., 1 Y. & Coll. Ch. 651.

(e) *Whateley v. Crowter*, *Carew v. Davies*, *supra*; see also *Turner v. Goulden*; L. R. 9 C. P. 57; *Marquis of Bute v. Lewis*, W. N. 1867, 65.

(f) *M'Mahon v. Ellis*, 10 Ir. C. L. Rep. 120.

(g) See *Hoffmann v. Postill*, L. R. 4 Ch. App. 673; *Commissioners of Sewers v. Glasse*, ib. 15 Eq. 302; W. pl. 342-3; *A. G. v. Corp. of London*, 2 Macn. & G. 247, 256 seq.

(h) See per Lord Lyndhurst, L. C., 15 L. J. Ch. 84, 1 Phill. 220; *Smith v. Duke of Beaufort*, 1 Ha. 507; 1 Phill. 209; per Bruce, V.-C., 1 Y. & C. Ch. 651.

was within the manor, production was, upon the application of the Crown, ordered of the court rolls of the manor, in order to show whether there was not an *absence of entries of admissions to the manor in respect of the foreshore* (i); and, in an information by the Crown claiming as such the soil of the river Thames against the Corporation of London, claiming as owners of the soil and also conservators of the river, an interrogatory was allowed asking, "*is it not true that no charter or patent contains any grant of the soil, etc., to the Corporation?*" (k). The common case of a defendant requiring production of documents relating to the plaintiff's case, is very different, it is said, from a case where a defendant comes against a plaintiff and says, "You have documents in your possession which disprove your own case" (l). Though the plaintiff in an action for infringement of a patent, where the novelty of the invention is denied, has no right to a discovery of the particulars of the prior user relied upon by the defendant, i.e., the particulars of his defence (m), when you come to the case of a defendant asking questions of a plaintiff, it is a very different thing. *It is the defendant's business to destroy the plaintiff's case*, and there the defendant has a right to ask all questions which are fairly calculated to show that the patent is not a good patent, or that what he alleges to be an infringement is not an infringement (n). The above remarks must, however, be construed with reference to the particular case before the Court, for it is well established that the rights of plaintiff and defendant to discovery are reciprocal (o), and that a defendant is not any more than a plaintiff entitled to see the evidence of his opponent's case (p).

Although a party is not entitled to a discovery of his opponent's case, except to the limited extent above mentioned (q), yet he is entitled to a discovery not only in support of his *original prima facie* case, but also of his *answer to his opponent's case* (r). "Nothing can be more

(i) *A. G. v. Emerson*, C. A., 10 Q. B. D. 191.

(k) *A. G. v. Corp. of London*, 12 Beav. 8; 2 Macn. & G. 247.

(l) See *Boyd v. Petrie*, 20 L. T. 934, per Selwyn, L. J.; *Smith v. Duke of Beaufort*, 1 Ha. 507, 1 Phill. 209.

(m) See *Daw v. Eley*, 2 H. & M. 725; per Giffard, L. J., L. R. 4 Ch. App. 681. But see *post*, p. 172, as to statutory particulars in such cases.

(n) See *Hoffman v. Postill*, L. R. 4 Ch. App. 673, 681; per Giffard, L. J.

(o) See per Lord Romilly, M. R., 42 L. J. Ch. 346.

(p) *V. ante*, p. 33.

(q) *V. ante*, p. 36.

(r) W. pl. 342; *A. G. v. London Corporation*, 2 Macn. & G. 247.

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clear," says Lord Cottenham, "from authority and universal practice, than that a plaintiff is entitled to discovery, not only of that which constitutes his own original title, but that he is also entitled to a discovery *for the purpose of repelling what he anticipates will be the defence*" (s). In such cases, the plaintiff does not call upon the defendant to discover *his own case or evidence*, but *makes a specific case of his own*, and asks discovery, in opposition, it is true, to the defence, but which being addressed to the proof of a case specifically made in the bill, is clearly distinguishable in principle as well as fact, from a direct inquiry into his opponent's case (t). Thus, a plaintiff, in addition to discovery of matters supporting his claim, is entitled to a discovery of matters which support his *reply* (if the defence be more than a simple denial of his case) (u), and the defendant, in like manner, if the reply be more than such simple joinder of issue, is entitled to discovery in support of his *rejoinder*, and each party is entitled, generally speaking, to discovery from the other of matters as to which the *burden of proof rests upon him*, but not of matters as to which the burden of proof rests upon his opponent (x), except to the extent of knowing generally what his case is.

Must be some title or case set up.

It has been said that the rule of protection is founded upon the fact of *some title or case* having been set up by the objecting party, and does not apply to the case of a defendant whose case is merely a denial that the plaintiff has any case at all, for that there must be some legal foundation for his title before a defendant is to be at liberty on that ground to protect himself from discovery (y).

Fishing interrogatories are objectionable.

Interrogatories directed to destroy an opponent's case should be founded on *specific pointed allegations of clear and unquestionable materiality* (z), for discovery is given to a party to assist him in proving a *known case*, and not to

(s) 2 Macn. & G. 256; see *per Knight-Bruce*, V.-C., 1 Y. & C. Ch. 651; *per Bacon*, V.-C., 7 Ch. D. 443; *Bute v. Lewis*, W. N. 1867, 65.

(t) W. pl. 114. It must be a *specific averment* and not a *general charge* (cf. *Combe v. City of London*, 4 Y. & C. 139, with *Smith v. Duke of Beaufort*, 1 Ha. 507, 1 Phill. 209).

(u) See *Bayley v. Griffiths*, 1 H. & C. 529; *Goodman v. Holroyd*, 15 C. B. N. S. 839.

(x) See *per Jessel*, M. R., 16 Ch. D. 95.

(y) *A. G. v. London Corporation*, 2 Macn. & G. 247, 265-6, *per Lord Cottenham*, L. C.

(z) See *per Knight Bruce*, V.-C., 15 Jur. 715; *Bovill v. Smith*, L. R. 2 Eq. 459.

assist him in a mere roving speculation, to see if he can fish out a case, or spy out flaws in his opponent's (a). To a certain extent, every interrogatory is a fishing interrogatory, in this sense, that it seeks to ascertain whether one or more facts, material or useful towards establishing a cause of action or a defence, can be shown by the admission or testimony of the party interrogated. But there is another sense in which the term is more properly applied—where a party, without showing any probable reason for believing that he has a cause of action, or a ground of defence, seeks to learn his adversary's evidence, so that he may assail it, or seeks information for the chance of discovering whether he has some right, or has suffered some wrong, of which as yet he knows nothing (b). Thus, where interrogatories were delivered by a defendant in an action of libel in support of a plea of justification, Archibald, J., said, "The defendant must know that the plaintiff has written the articles upon which he seeks to justify, and not have to interrogate him to discover it. That is *fishing for a defence*. The defendant might ask, *did you not in certain papers write such and such articles?* and not, *what articles did you write?*" (c).

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Similarly, a party is not entitled to discovery of documents, merely for the purpose of ascertaining whether they contain anything tending to disprove his opponent's case. If he does not claim anything positively or affirmatively under the documents in question, he cannot call for them merely because they may, upon inspection, disclose some defect in his adversary's case, and so help him and hurt his adversary, whose title they are (d). In *Bolton v. The Corporation of Liverpool*, the bill alleged generally, that, if the corporation would produce their own documents relating exclusively to their own title, it would thereby appear that their case at law was unfounded, that is, that the production of the documents of the corporation would furnish evidence against themselves. The defendant denied the allegation, and the Court decided that where a defendant credibly denies the allegation upon

Discovery of documents not granted to pick holes in them.

Bolton v. Corporation of Liverpool.

(a) W. pl. 203; *Philipps v. P.*, C. A., 4 Q. B. D. 127; Hare, 186; *Daw v. Eley*, 2 H. & M. 725; see *per Pigot*, C. B., Ir. Rep. 5 C. L. 498.

(b) *Per Pigot*, C. B., Ir. R. 2 C. L. 651.

(c) *Buchanan v. Taylor*, W. N. 1876, 73; see *Gourley v. Plimsoll*, L. R. 8 C. P. 362; *per Bramwell*, B. 11 L. T. 139.

(d) See *Bolton v. Corporation of Liverpool*, 3 Sim. 467, 1 Myl. & K. 88.

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Form in which
protection to
be claimed.

Rule laid down
by Knight-
Bruce, V.-C.

The questions naturally suggest themselves: (1.) What statement on the part of the party resisting production on this ground is essential to the claim for protection, and (2.) Whether such statement is in all cases to be accepted as conclusive or not. The rule upon both points was laid down by Vice-Chancellor Knight-Bruce (g), and recently adopted by the Court of Appeal (h), in these terms: "If it be with distinctness and positiveness stated in an answer that a particular document forms or supports the defendant's title, and is intended to be, or may be, used by him in evidence accordingly, and does not contain anything impeaching his defence, or forming or supporting the plaintiff's title, or the plaintiff's case (i), that document is, I conceive, protected from production, unless the Court sees (k), upon the answer itself, that the defendant erroneously misrepresents or misconceives its nature (l). But where it is consistent with the answer that the document may form the plaintiff's title, or part of it, may contain matter supporting the plaintiff's title, or the plaintiff's case, or may contain matter impeaching the defence (m), then, I apprehend, the document

(e) See *per* Wigram, V.-C., 1 Ha. 521—2; *per* Lord Lyndhurst, L. C., 1 Phill. 220, 15 L. J. Ch. 84 (approving the decision).

(f) See *per* Wigram, V.-C., 1 Ha. 522.

(g) In *Combe v. Corporation of London*, 1 Y. & C. Ch. 631, 651.

(h) *A. G. v. Emerson*, C. A., 52 L. J. Q. B. 67 (10 Q. B. D. 191). The rule though laid down with respect to answers, applies equally to *affidavits* claiming protection for documents under the modern practice (see *per* Brett, L. J., *ib.* 74).

(i) See the form in *Minet v. Morgan*, L. R. 8 Ch. App. 361, approved of by James, L. J., in *Corporation of Hastings v. Ivall*, *ib.* 1017, 1021.

(k) *I.e.*, is reasonably satisfied or certain (see *A. G. v. Emerson*). There must be that degree of certainty which a man of reasonable care would, in the ordinary course of things, act upon as a certainty (*per* Brett, L. J., *ib.* 73).

(l) *I.e.*, as to its supporting his own case and not supporting his opponent's (*ib.*). See *per* Kindersley, V.-C., 6 W. R. 118; W. pl. 318; *Ponsonby v. Hartley*, lxxiv Law Times, 208.

(m) As in *Smith v. Duke of Beaufort*, 1 Ha. 507, 1 Phill. 209.

is not protected; nor, I apprehend, is it protected if the character ascribed to it by the defendant is not averred by him with a reasonable and sufficient degree of positiveness and distinctness" (n).

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The mere use of the word *title*—the mere allegation that the documents *relate exclusively to the defendant's title* (o) is of no avail to the defendant in resisting production, if that conclusion be opposed by the obvious character of the documents, or if it be not supported by specific averments excluding all probability that the documents would furnish evidence in support of the plaintiff's *case* (p). It may even be a question, though the expression is in common use, what a defendant in swearing to an answer understands by "*the plaintiff's case*" (q). The claim of privilege will not be allowed it it appear, on the face of the answer, that the defendant has not himself inspected the documents (r); a statement made entirely on the faith of information received from other persons as to the documents is not sufficient to protect them from production (s). It will be observed that there are four allegations deemed important in order to maintain a claim for protection, *viz.*, (1.) *That the document supports the defendant's (t) title*; (2.) *That it is intended to be, or may be used by him in evidence accordingly*; (3.) *That it does not contain anything impeaching his defence*; or (4.) *Forming or supporting the plaintiff's (t) title or case*. If these four states of circumstances co-exist, then, it is said, the document is protected from production, unless the Court sees upon the answer itself that the *defendant erroneously represents or misconceives its nature* (u).

The considerations by which the Court should be guided in determining upon the conclusiveness or otherwise of the claim of privilege, when technically sufficient, are fully expressed in the judgments of the Lords Justices in the case

Whether oath
of defendant
conclusive or
not.

(n) See *Bannatyne v. Leader*, 10 Sim. 230.

(o) See *per Kindersley, V.-C.*, 35 L. J. Ch. 401, 30 *ib.* 799.

(p) *Per Wigram, V.-C.*, 4 Ha. 185. See *per Kindersley, V.-C.*, *ubi supra*; *Lyell v. Kennedy*, H. L., 52 L. J. Ch. 385, 8 App. Cas. 217.

(q) See *per Knight-Bruce, L. J.*, 8 De G. M. & G. 478.

(r) *Manby v. Berwiche* (No. 3), 8 De G. M. & G. 476; see *Combe v. Corporation of London*; *Gabbett v. Cavendish*, 3 Swanst. 267, n.

(s) *Per Knight-Bruce, L. J.*, 8 De G. M. & G. 479.

(t) By "defendant" and "plaintiff" are of course meant *the parties seeking and resisting production* respectively.

(u) See *per Baggallay, L. J.*, 52 L. J. Q. B. 70.

CHAP. IV. of the *Attorney-General v. Emerson* (x), above cited. Lord
Sect. 3. Justice Brett said: "If either from the description of the

Rule laid down
 by Brett, L. J.

documents, or from the answers with regard to the other documents, or from an inspection of other documents which have been produced without any objection being made (y), or from any other admission in the course of the proceedings, the whole of which are before the Judge or the Court, it can be seen, with the certainty that I have before described, that the defendant cannot be trusted when he swears in the form I have described (z), then the Court will not give effect to the defendant's oath, but will act upon their own view that the description of the documents given by the defendant cannot be trusted. Where the documents are shown to be of such a nature that the Court alone at the final hearing can say that they will not assist the plaintiff's case, and cannot negative the defendant's case, and where in the opinion of the Court it is certain that the affidavit which has been made cannot properly be met, the Court will act upon the affidavit. But where the Court are certain in the sense I have described (zz), that the documents will assist the plaintiff's case, or negative the defendant's case, there they will not act upon the affidavit. * * * If the nature of the documents is shown to the Court to be such that the Court can say with certainty that no person in the position of the defendant can affirm or negative the parts which he does affirm or negative, then the affidavit cannot be accepted by the Court as a satisfactory affidavit. The Court, unless they can, in the manner and to the extent described, be certain that the document is of such a character that the defendant cannot properly swear to the effect to which he is bound to swear, must trust the oath of the defendant and refuse the order for production." And Lord Baggallay, L.J. Justice Baggallay said: "It appears to be clear from the proposition laid down by Vice-Chancellor Knight-Bruce, which I am prepared to adopt as a guide, that it is the duty of a Judge, if he finds a defendant's answer in such precise terms as those pointed out by the Vice-Chancellor, to ascertain whether, from a consideration of the whole case, he is satis-

(x) *Ubi supra*. See *Ponsonby v. Hartley*, C. A. (cited *ante*, p. xxxix).

(y) See *Corporation of Hastings v. Ivall*, L. R. 8 Ch. App. 1017; *Imper. Land Co. v. Masterman*, 29 L. T. 559.

(z) *I.e.*, the form prescribed by Knight-Bruce, V.-C. (*ante*, p. 42).

(zz) *V. ante* (k).

fied that the defendant has erroneously represented or misconceived the nature of his case. In order to do that it is necessary to go into the whole of the answer, but I do not depart from adopting the view which has been repeatedly acted upon, that where there is *nothing but the clear and positive denial of the defendant*, in some such terms as those enunciated in *Combe v. Corporation of London* (a); there the oath of the defendant must be accepted, and credit given to it" (aa). Accordingly, in that case, the question being between the Crown and the lord of the manor, whether a certain foreshore was within the boundaries of the manor, production was ordered of certain of the court rolls and minute books of the manor, for which protection was fully claimed by the defendant as relating solely to his own title, it being admitted that they related to the matters in question, and no objection having been made to the production of earlier documents of precisely the same class (b).

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The very nature of the dispute between the parties may render it impossible to bind the one by the other's views of the character and effect of the documents in his possession (bb), as where the question in dispute turns upon the very nature or effect of the documents, as an *inference of law*, in which case conclusive effect cannot be given to the oath of the party as to them (c). The case might be a complicated one of title, and a man who is not a professional man might well come to the conclusion that particular documents, according to his view, would not in any way support his opponent's or imperil his own title (d).

Effect of documents may be question of law.

It is not in all cases necessary for the party to swear *absolutely* that the documents do not support or tend to support his opponent's case (e); a denial to the best of his knowledge, information, and belief will be sufficient, unless there is, as in the case of *Combe v. Corporation of Lon-*

Denial of relevancy to opponent's case need not be absolute.

(a) *Ubi supra*.

(aa) *Ib.* 71.

(b) *A. G. v. Emerson*, C. A., 10 Q. B. D. 191.

(bb) *Ferrier v. Atwood*, 14 L. T. 278. See Hare, 279; *A. G. v. Emerson*, C. A.

(c) See *Gresley v. Mousley*, 2 K. & J. 288; *Ponsonby v. Hartley*, W. N. 1883, 13; *per Lord Cranworth*, V.-C., 1 Sim. N. S. 162.

(d) See *per Baggallay*, L. J., 52 L. J. Q. B. 71. It was probably with reference to cases of this class that it has been said that the applicant has a right to see the documents in order to judge for himself whether they support his case or not (see *per Wigram*, V.-C., 1 Ha. 520; *per Wood*, V.-C., 2 J. & H. 323—4, 2 K. & J. 292; *per Lord Cranworth*, V.-C., 1 Sim. N. S. 161—2).

(e) *Minet v. Morgan*, L. R. 8 Ch. App. 361 (title-deeds), following *Peile v. Stoddart*, 1 Macn. & G. 192.

CHAP. IV. *don (f)*, something which qualifies the statement, or shows
Sect. 3. substantial insufficiency on the face of the affidavit (*g*).

SECT. 4.—*Of the objection on the ground of injurious consequences to the party giving discovery (a).*

Sect. 4. This objection, which must be taken by the party himself upon oath, in his answer or by affidavit (*b*), may be raised on any of the following grounds :

1. Tendency to self-crimination.

I. That to give the discovery sought might criminate or tend to criminate the party giving it, or the husband or wife of such party (*c*), *i.e.*, bring him into the peril and possibility of being convicted as a criminal (*d*). The Court should not regard the form of words in which the privilege is claimed, but should look to see whether answering would be likely to have or probably would have such a tendency to criminate (*e*). The existence of the alleged peril is the main question to be considered, and it would be a great pity to lay down a particular form of words for declining to answer (*f*). Thus, in an action for libel, an objection to answer interrogatories directed to prove publication on the ground that the party was "advised that they *might* tend to criminate" him was upheld (*g*).

Court not bound by mere statement of party.

The Court or Judge is not bound to accept the mere statement of the party's own belief that his answer may tend to criminate him, but is entitled to decide, whether the question has really, or may fairly be considered, under all the circumstances of the case, as having, that tendency. In the parallel case of a witness, the law was thus laid down in the case of *Reg. v. Boyes (h)*, which was approved of and

(*f*) 1 Y. & C. Ch. 631, 15 L. J. Ch. 80.

(*g*) See *per* Lord Selborne, L. C., L. R. 8 Ch. App. 366.

(*a*) See Hare, part III., ch. i.; Kerr, part I., ch. vi., s. 2.

(*b*) *Webb v. East*, 5 Ex. D. 23, 102 (C. A.).

(*c*) W. pl. 130; Mitf. [130]; Hare, 100 *seq.*; Kerr, 149 *seq.* See also *Fisher v. Owen*, C. A., 8 Ch. D. 645, 649; *Althusen v. Labouchere*, C. A., 3 Q. B. D. 654, 658; *Webb v. East*; *Lamb v. Munster*, 10 Q. B. D. 110.

(*d*) *Per* Field, J., 10 Q. B. D. 111.

(*e*) See *per* Field, J., *ib.* In the case of documents, their criminatory character should be distinctly stated (*Roe v. N. Y. Ass. Press*, *ante*, p. xxxvii).

(*f*) See *per* Stephen, J., 52 L. J. Q. B. 48 (*s.c.*)

(*g*) *Lamb v. Munster*, *ubi supra*. See *M'Mahon v. Ellis*, 10 Ir. C. L. Rep. 120.

(*h*) 1 B. & S. 311, 329 *seq.* Where the liability is a mere question of law, the Court must determine it (*Re Mexican Co.*, 27 Beav. 474).

followed by the Court of Appeal in a recent case (i). "To entitle a party called as a witness to the privilege of silence, the Court must see from the circumstances of the case, and the nature of the evidence which the witness is called to give, that there is *reasonable ground to apprehend danger to the witness from his being compelled to answer*. We indeed quite agree that, *if the fact of the witness being in danger be once made to appear, great latitude should be allowed him in judging for himself of the effect of any particular question*; there being no doubt, as observed by Baron Alderson in *Osborn v. London Dock Company* (k), that a question which might appear at first sight a very innocent one, might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering (l). Subject to this reservation, a Judge is, in our opinion, bound to insist on a witness answering, *unless he is satisfied that the answer will tend to place the witness in peril*." In such a case it becomes the duty of the Judge to look at the nature and all circumstances of the case and the effect of the question itself, to see whether it is a question the answer to which will really tend to criminate the witness (m). If the party assigns a reason for not answering which, in the opinion of the Court, will not criminate him, he will not be protected (n). A *bare possibility* of legal peril is not sufficient to entitle a party to protection. The danger to be apprehended must be real and appreciable with reference to the ordinary operation of law in the ordinary course of things, and not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct (o); the question is, Is there practically any reason to anticipate such a danger? (p).

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But must
decide as to
sufficiency of
objection.

Danger must
be real and
substantial.

(i) *Ex parte Reynolds*, 20 Ch. D. 294. Where the question obviously tends to criminate, as in an action for libel when the defendant is asked whether he wrote the alleged libel, it is of course unnecessary to state any grounds of objection (see *Lamb v. Munster*).

(k) 10 Ex. 698, 701.

(l) *Maccallum v. Turton*, 2 Y. & J. 183; *Glynn v. Houston*, 1 Keen, 329; W. pl. 138.

(m) *Per Field, J.*, in *Lamb v. Munster*, 10 Q. B. D. 111.

(n) *Scott v. Miller*, Johns, 220; *Ex parte Aston*, 4 De G. & J. 320.

(o) *Reg. v. Boyes*, 1 B. & S. 311, followed and approved in *Ex parte Reynolds*, C. A., 20 Ch. D. 294. See *Short v. Mercier*, 3 Macn. & G. 205, 217; *Sidebottom v. Adkins*, 3 Jur. N. S. 631.

(p) *Per Cockburn, C. J.*, 1 B. & S. 326.

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Liability
under foreign
law.

The protection applies equally whether the party is amenable to the laws of a *foreign country* or to the laws of this country, but in the former case a bare statement of such liability without showing what the law in question is, is not sufficient to protect the party from answering; it must be shown *what the law is*, and *that it is applicable* to the particular case (*q*).

It is no ground of objection, however, that the answer might expose the person objecting to civil actions (*r*), or that it might expose other persons (except it be the husband or wife of the party) to criminal proceedings (*s*).

2. Exposure to
penalty or
forfeiture.

II. That it would expose the party to a *penalty*, by which is meant a penalty strictly so called (*t*), as in the case of a solicitor being struck off the rolls (*u*), or a fine imposed for an offence, and not merely something really equivalent to liquidated damages, (as where a party has bound himself by a penalty not to do a particular act) (*x*), or a forfeiture of a penal nature (*y*), *i.e.*, the violent and premature determination of a lawfully existing estate or interest, not the mere determination by a limitation to that effect (*z*), or the loss of a sum of money (*a*), unless as a fine on conviction for an offence (*aa*). There is a fine but well established distinction in this respect between cases where a certain estate is given to an individual, but with a condition annexed, that upon the happening of a certain event there shall be a forfeiture of the estate so given, and those, where the estate is so limited as only to endure till a certain event occurs, and then to go over, commonly called "conditional limitations" (*b*), for a man has no right to say "Although my estate has determined in consequence of

Distinction
between for-
feiture and
conditional
limitation.

(*q*) See the judgment of Lord Chelmsford, L. C., in *U. S. v. McRae*, L. R., 3 Ch., App. 79, 84 *seq.* (distinguishing and explaining the case of *King of Two Sicilies v. Wilcox*, 1 Sim. N. S. 301); *Heriz v. Kiera*, 11 Sim. 318.

(*r*) *Tetley v. Easton*, 18 C. B. 643; *Murray v. Clayton*, L. R. 15 Eq. 115, 119; see 46 Geo. 3, c. 37.

(*s*) *McCorquodale v. Bell*, W. N. 1876, 39; *King of Two Sicilies v. Wilcox*, *supra*.

(*t*) W. pl. 131; Hare, 100 *seq.*; *The Mary*, L. R. 2 A. & E. 319; see 46 Geo. 3, c. 37.

(*u*) See *Nelme v. Newton*, 2 Y & J. 186 n.; *Scott v. Miller*, John. 328.

(*x*) See *French v. Macabe*, 2 Dr. & War. 269.

(*y*) *Jones v. Green*, 3 Y. & J. 298; *U. S. v. M'Rae*, L. R. 3 Ch. App. 79.

(*z*) *Pye v. Butterfield*, 5 B. & S. 829; Hare, 118 *seq.*; *Hurst v. H.*, 30 L. T. 698. See *A. G. v. Lucas*, 2 Ha. 566.

(*a*) See *Sloman v. Kelly*, 4 Y. & C. 169.

(*aa*) See *Hemmings v. Williamson*, 10 Q. B. D. 459 (statutory penalty).

(*b*) *Fer Kindersley, V.-C.*, in *Hambrook v. Smith*, 17 Sim. 209, 216 *seq.*

the act, I have a right to refuse the disclosure whether my estate has determined" (c). CHAP. IV.
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Liability to a penalty or forfeiture imposed by the law of a foreign country is a sufficient ground of objection, provided satisfactory evidence be given of the existence of such law and its applicability to the case in question (d). It is no ground of objection, however, that the disclosure may expose the party to *pecuniary* loss or liability (e). Liability by
foreign law.

Until the doubts recently expressed by the Master of the Rolls and Lords Justices Baggallay and Cotton in a recent case before them (f), the privilege appears to have been unquestionably considered as equally applicable to the case of production of documents (g); on principle, there should be exactly the same privilege in the one case as the other, seeing that applications for production are analogous to exceptions to an answer, so that *a party cannot be compelled to produce any document which he could not have been compelled to set out in his answer* (h), and it is upon this very ground that Sir James Wigram bases the existence of the privilege (i). Sembly, ground
for refusing to
produce docu-
ments.

In any of the above cases, if the reason for allowing the protection has ceased, as by the expiration of the time in which criminal proceedings can be taken (k), or by the granting of a pardon to the offender (l), or where the party seeking the discovery is able and willing to waive the penalty or forfeiture and expressly offers to do so (m), or where the object-

Where liability
ceases, privi-
lege ceases.

(c) *Ib.*

(d) *King of Two Sicilies v. Wilcox, supra*; *U. S. v. McRae*, L. R. 3 Ch. App. 79; *v. ante*, (g).

(e) See 46 Geo. III., c. 37.

(f) *Webb v. East*, C. A., 5 Ex. D. 108.

(g) See W. pl. 290; *Parkhurst v. Lowten*, 1 Mer. 391, 2 Swanst. 194, 213; *Nelme v. Newton*, 2 Y. & J. 186 n.; *Ewing v. Osbaldiston*, 6 Sim. 608; *Rice v. Gordon*, 13 ib. 580; *King of Two Sicilies v. Wilcox*, 1 Sim. N. S. 331. See also *Mitchell v. Koecker*, 18 L. J. Ch. 294, and *Robinson v. Kitchen*, 21 Beav. 365 (where answers as to documents were refused on the ground of liability to penalties). The authorities at Common Law, of which *Hill v. Campbell*, L. R. 10 C. P. 222, is the latest, are designedly omitted. With the exception of Taylor on Evidence, (ed. 7), 1464, 1793 (who states the proposition with a query, referring to *Reg. v. Leatham*, 6 Cox, 501, 3 E. & E. 658), there is a *consensus* of opinion in support of the privilege, though the cases cited as authorities are not always well chosen (see Roscoe, Ev. 154; Best, Ev. s. 216; Greenleaf, Ev. s. 300; Daniel, 1695; Hare, 105; Steph. Dig. Ev., art. 118). See *Roe v. N. Y. Ass. Press, ante*, p. xxxvii.

(h) See W. pl. 290.

(i) *Ib.*

(k) Hare, 120 seq.; W. pl. 142; Tayl. Ev. § 1458.

(l) *Reg. v. Boyes*, 1 B. & S. 311.

(m) W. pl. 140—1; Hare, 110 seq.; see *per* Wood, V.-C., L. R. 4 Eq. 334, 338—9.

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Party estopped
from taking
the objection.

Waiver.

Statutory
exceptions.

ing party has, by the effect of his own acts, excluded himself from the benefit of the rule, or, as it is said, "contracted himself out of the protection" (*n*), or estopped himself from taking the objection (*o*), the protection will cease also and the party will be bound to give the discovery sought. Thus, it was held that a man, who had held himself out as a sworn broker of the City of London, could not refuse discovery to his principal of his dealings and transactions on the ground that it might subject him to penalties for having acted as a broker without being duly admitted as such, the ground of the decision being that a man is bound to make good his express or implied representations (*p*). It is, of course, open to the party to waive this, as well as any other ground of protection (*q*), but where it is claimed for a document, it is no answer to show that it was waived on a previous occasion (*r*).

Again, in certain cases, the Legislature has, on grounds of public policy, deprived individuals or a class of individuals of the privilege of silence, with or without any indemnity for any evil consequences entailed by its removal (*s*), *e.g.*, in the case of printers, publishers, and proprietors of newspapers, who are bound to divulge the nature of their connection therewith, while shielded from the consequences of such discovery (*t*). It is, of course, open to the party seeking the discovery to prove the facts *aliunde* (*u*), or to give secondary evidence of the documents withheld (*x*).

The party required to answer may refuse to answer further, although what he has already disclosed may be ample evidence to convict him (*y*). No unfavourable inference *should* be drawn from the refusal to answer; it is obvious, however, that such a course is likely to be very prejudicial to the party before a jury (*z*).

(*n*) *Per* Hart, V.-C., *Green v. Weaver*, 1 Sim. 404, 427 *seq*; *per* Romilly, M. R., 21 Beav. 370.

(*o*) See *Robinson v. Kitchen*, 21 Beav. 365; S. C. 8 De G. M. & G. 88; Hare 111, *seq*; W. pl. 143.

(*p*) *Robinson v. Kitchen*, *ubi supra*.

(*q*) See *Cary v. Cuthbert*, Ir. Rep., 6 Eq. 559.

(*r*) *V. post*, p. 52 (*p*).

(*s*) See Hare, 108 *seq.*, and cases there cited; Tayl. Ev., § 1455; *Reg. v. Scott*, 25 L. J. Mag. 128; *Ex parte Schofield*, C. A., 6 Ch. D. 230 (examination of bankrupts); 24 & 25 Vict. c. 96, s. 85.

(*t*) By 6 & 7 Will. IV. c. 76, s. 19, as re-enacted by 32 & 33 Vict. c. 24; see *Dixon v. Enoch*, L. R. 18 Eq. 394; *Bowdler v. Allen*, 39 L. J. C. P. 217; *Ramsden v. Brearley*, 33 L. T. 322; *Lefroy v. Burnside*, 4 Ir. L. R. 340.

(*u*) See *Mitchell v. Koecker*, 12 Beav. 44.

(*x*) See *per* Lord Eldon, L. C., 2 Swanst. 213.

(*y*) See *Reg. v. Garbett*, 2 C. & R. 474; *Cooke v. Turner*, 14 Sim. 218.

(*z*) The decision of the C. A. in *Fisher v. Owen* (8 Ch. D. 645) has been objected to on this ground (see *per* Field, J., 52 L. J. Q. B. 47).

SECT. 5.—*Of the objection on the ground of professional privilege (a).*

On grounds of *necessity and public policy (b)*, confidential communications between a client and his professional legal adviser (*c*) are protected from disclosure by discovery or otherwise (*d*). By "legal advisers" are meant professional legal advisers, that is, barristers, solicitors, and their clerks, whether belonging to the courts of this or a foreign country, *e.g.*, a Scotch solicitor and law agent practising in this country (*e*), and all recognised and usual intermediate agents between them and their clients (*f*). "The principle is established that where a person has occasion to employ a solicitor, and the solicitor, in order to enable himself to advise on the matter, calls in some person to assist him and to give his opinion, such communications are as much privileged as if they came from the solicitor himself. In such a case the person called in * * * is *pro hac vice* the solicitor's clerk" (*g*). In the Court of Chancery the privilege has been held to apply to communications with a person who, unknown to the client, had ceased to practise as a solicitor at the time when they were made, and the same would probably be held now (*h*). The privilege is that of the *client*, not of the legal adviser (*i*), and it is the *duty* of the latter to claim it on his client's

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Communications between legal advisers and their clients are privileged.

Privilege belongs to client.

(a) See Hare, part iii., ch. iii., ss. 1-2; Kerr, part i., ch. vi., s. 1; Steph. Ev., art. 115.

(b) See *per* Turner, V.-C., 9 Ha. 387, 390; *per* Jessel, M. R., 2 Ch. D. 648 *seq.*; *per* Cotton, L. J., 3 Q. B. D. 621 *seq.*

(c) That the privilege is confined to legal advisers, see *per* Jessel, M. R., 2 Ch. D. 650-1; 17 *ib.* 681-2; *Slade v. Tucker*, 14 *ib.* 824; Steph. Dig. Ev. 171.

(d) The fullest and latest expositions of the law upon this subject are contained in the cases of *Anderson v. Bank of British Columbia*, 2 Ch. D. 644; *Bustros v. White*, 42 L. J. Q. B. 642; *Southwark Water Co. v. Quick*, 3 Q. B. D. 815; *Wheeler v. Le Marchant*, 17 Ch. D. 675, and *Kennedy v. Lyell* (cited *ante*, p. xxxv.), decided by the Court of Appeal.

(e) *Lawrence v. Campbell*, 4 Drew, 485; *Banbury v. B.*, 2 Beav. 173. That the friendly opinion of a lawyer is not privileged, see *Smith v. Daniel*, L. R. 18 Eq. 649; *Hampson v. H.*, 26 L. J. Ch. 612.

(f) Steph. Dig. Ev., art. 115; Tayl. Ev., s. 911, 920; *Slade v. Tucker*, 14 Ch. D. 824; *Hooper v. Gumm*, 2 J. & H. 602.

(g) See *per* Wood, V.-C., *Walsham v. Stainton*, 2 H. & M. 1, 5 (accountant); *Churton v. Frewen*, 2 Dr. & Sm. 390 (interpreter). Before litigation or dispute it is otherwise (*v. post*, p. 56).

(h) *Calley v. Richards*, 19 Beav. 401; see *per* Bacon, V.-C., L. R. 18 Eq. 654.

(i) See *per* Jessel, M. R., 2 Ch. D. 649; *Reg. v. Kinglake*, 11 Cox, C. C. 499.

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May be waived.

behalf. It may, therefore, be waived by the client, either expressly or by conduct (*k*); thus, the right of protection for documents may be lost by setting them out in pleadings or affidavits (*l*), and where a corporation elected to answer by their town clerk, who was also their solicitor, they were held to have thereby waived their privilege and precluded themselves and him on their behalf from claiming it (*m*); but the privilege is not waived by the mere fact of the solicitor making an affidavit in the action in support of his client's claim, if it do not contain statements as to the matters contended to be privileged (*n*) or by having previously furnished the opposite party with a copy or a statement of the effect of a privileged document (*o*), and it is no answer to such claim when set up to show that it has been waived on a previous occasion (*p*).

Duration of
privilege.

As regards its duration, the rule is "once privileged always privileged." The mouth of the attorney, with respect to privileged communications, is closed for ever, unless he has the permission of his client (whose privilege it is) to speak; and it is immaterial whether the client be a party to the suit or not (*q*). Unless the client waives the benefit of it, Courts of justice are bound to consider such communications as if they never had been made (*r*). It is not affected by the death of the client (*s*), but follows the legal interest and enures for the benefit of those claiming under him (*t*), and may, apparently, be set up by the legal representatives of a deceased legal adviser (*u*).

I. Communi-
cations between
client and legal
adviser.

The first and most obvious class of privileged communications consists of *communications between the client himself and the legal adviser*. In this case, the privilege is not confined to communications when made either during an actual

(*k*) See *Blenkinsopp v. B.*, 17 L. J. Ch. 343, where the client waived the privilege on the application for production.

(*l*) See *Mornington v. M.*, 2 J. & H. 697; *M'Intosh v. G. W. R.*, 1 Macn. & G. 73; *Drake v. Symes*, John. 647.

(*m*) *Mayor of Swansea v. Quirk*, 5 C. P. D. 106.

(*n*) *Turton v. Barber*, L. R. 17 Eq. 329. See *Reg. v. Levison*, 11 Cox C. C. 152.

(*o*) *Carey v. Cuthbert*, I. R. 6 Eq. 599.

(*p*) *Underwood v. Secretary for India*, 35 L. J. Ch. 345.

(*q*) *Per Wigram, V.-C.*; 7 Ha. 86; Taylor, Ev., s. 927.

(*r*) *Per Wigram, V.-C.*, *ib.*

(*s*) *Russell v. Jackson*, 9 Ha. 387; *Chant v. Brown*, 7 *ib.* 79; 9 *ib.* 790; *per Stuart, V.-C.*, 4 Giff. 380.

(*t*) See as to the course of devolution of the privilege, *per Turner, V.-C.*, 9 Ha. 393 *seq.*; *Ford v. De Pontes*, 5 Jur. N. S. 993.

(*u*) See *per Lord Eldon, L. C.*, 1 Mer. 114.

or in anticipation of an apprehended litigation concerning the subject to which they relate (x). It is sufficient if they pass as *professional communications in a professional capacity* (y) with no reference to any particular litigation, and without any other reference to litigation generally than all human affairs have, in so far as every transaction may, by possibility, become the subject of inquiry (z). "As I understand it," said Pearson, J., in a recent case (a), "the doctrine of privilege is now extended to *all* communications from a client to his solicitor in his professional capacity."

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The rule is, however, subject to the following limitations : 1. Must be
1. The legal adviser's knowledge of the matter of which discovery is sought must have been in some sense acquired as the result of a *communication*, for the privilege does not extend to *mere collateral facts*, things done, which the legal adviser knows by any other means than confidential communication with his client, though, if he had not been employed as such, he probably would not have known them (b). Thus, he may prove the client's swearing to the truth of an answer or affidavit, and his handwriting, by seeing it in documents prepared by him in the name of his employer ; in the same way he may prove the fact that a particular document is then in his possession and in court, for this is not a fact professionally communicated to him (c), or the state of a particular document at a particular time, for this is matter of *observation* merely, of which any other person who saw it would be

1. Must be
communication not fact
witnessed.

(x) That this was so, where the *legal adviser* was the party from whom the discovery was sought, was long since settled (see *per* Wigram, V.-C., 3 Ha. 124), but in the case of the *client* the rule long fluctuated and the privilege was not definitely settled upon its present footing until the decision of the Court of Appeal in *Minet v. Morgan*, L. R. 8 Ch. App. 361 (see *per* Hall, V.-C., *ib.* 17 Eq. 331, and *per* Brett, L. J., 34 L. T. 532), which has since been followed in *Turton v. Barber*, L. R. 17 Eq. 329; *Bacon v. B.*, 34 L. T. 349; *Mostyn v. West M. Co.*, *ib.* 531; *Eadie v. Anderson*, 47 L. T. 543; see also *Boyd v. Petrie*, 20 *ib.* 935.

(y) See *per* Kindersley, V.-C., 1 Dr. & Sm. 347, 4 Drew. 490, cited with approval by Lord Selborne, L. C., in *Minet v. Morgan*, *supra*; *per* Jessel, M. R., 18 Ch. D. 682; *Herring v. Cloberry*, 1 Phill. 91; *Cargmael v. Powis*, *ib.* 687.

(z) See *per* Lord Brougham, L. C., 1 Myl. & K. 102; *per* Giffard, L. J., 20 L. T. 935; *per* Wood, V.-C., 1 K. & J., 459 *seq.*

(a) *Eadie v. Addison*, 47 L. T. 543, 544; see *per* Bacon, V.-C., 34 L. T. 350; see, however, *Hartlepool Coll. Co. v. Moon*, C. A., 35 L. T. 585.

(b) See *per* Cur. *Dwyer v. Collins*, 7 Ex. 639, 646; *Sawyer v. Birchmore*, 3 Myl. & K. 572; *Desborough v. Rawlins*, 3 Myl. & Cr. 515.

(c) *Ib.* See *Bonner v. Jackson*, 1 De G. & Sm. 472 (solicitor bound to state to whom and for what purpose he parted with client's documents, and where they now are).

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- equally cognizant (*d*). What a solicitor is privileged from disclosing is that which is communicated *sub sigillo confessionis*, that is to say, some fact which the client communicates for the purpose of obtaining the solicitor's professional advice and assistance (*e*). Thus, a solicitor's knowledge of his client's residence, even though he knows it simply in consequence of the professional business in which he has been acting for him, is not *on that ground alone* a matter of confession, so as to be in the nature of a privileged or confidential communication. He may know it as a mere collateral fact, incidentally learned by him, or, on the other hand, it may have been communicated confidentially as his client's hiding place (*f*).
2. From client not stranger. 2. The matter of which discovery is sought to be withheld by the legal adviser must have been communicated to him directly or indirectly, by the *client himself*, and not merely acquired by him during and by virtue of the professional employment and in his character of legal adviser (*g*). He is bound to disclose information communicated to him from *collateral quarters* (*h*), and the mere fact of a client having made a confidential communication to his solicitor does not protect the solicitor from giving discovery, if he had acquired the same knowledge before or after such confidential communication, under such circumstances that he would be bound to discover it. The mere fact that a solicitor has confidential communications made to him does not merge the other sources of information (*i*). Nor, again, can a party, who is liable to give discovery at the suit of another, by communicating the matter of such discovery to his solicitor, for the purpose of getting his advice, on that ground alone excuse himself from giving the discovery which he would otherwise have been bound to give (*k*).
3. In ordinary 3. It must have been made touching matter which came

(*d*) See *Brown v. Foster*, 1 H. & N. 736. The presence of a *stranger* is fatal to the privilege (*Reg. v. Levison*, 11 Cox, 153). See, as to the distinction between confidential communications and those of facts patent to the senses, *Kennedy v. Lyell*, C. A., 48 L. T. 455.

(*e*) *Per James, L. J., Ex parte Campbell*, L. R. 5 Ch. App. 703, 705.

(*f*) *Ib.* See *Heath v. Crealock*, L. R. 15 Eq. 257.

(*g*) *Marsh v. Keith*, 1 Dr. & Sm. 342; *Thomas v. Rawlings*, 27 Beav. 140; *Ford v. Tennant* (No. 2), 32 *ib.* 162; *Desborough v. Rawlins*, 3 Myl. & Cr. 515.

(*h*) *Sawyer v. Birchmore*, 3 Myl. & K. 572; *Desborough v. Rawlins*, 3 Myl. & Cr. 515; *Ford v. Tennant*, 32 Beav. 162; *Gore v. Bowser*, 5 De G. & Sm. 30.

(*i*) *Lewis v. Pennington*, 29 L. J. Ch. 670, 672, *per Romilly, M. R.*

(*k*) See *per Wigram, V.-C.*, 7 Ha. 86; *per Wood, V.-C.*, 1 K. & J. 454.

within the ordinary scope of professional employment (*l*), no privilege, therefore, can be claimed for unnecessary (*ll*) communications, or those made in furtherance of any criminal, illegal, or fraudulent purpose (*m*), or the committal of a contempt of the authority of the Court (*n*). The true test in such cases, whether the communication is privileged or not, is whether the transaction as stated is one on which it was perfectly lawful for the client to ask, and for the solicitor to give legal advice (*o*), or whether on the face of the pleadings, it appears to be illegal or fraudulent (as was the case in *Reynell v. Sprye*) (*p*); and the fraud or illegality must be alleged to exist with reference to that part of the case to which the documents in dispute relate, or as to which the discovery is sought, and not with reference to matters entirely collateral to the communications with the legal adviser (*q*).

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course of legitimate business.

Test of legitimacy of advice given.

4. The privilege can only be set up as against strangers and not as against persons upon whose behalf, no less than on behalf of the party himself, the legal adviser was jointly consulted or employed (*s*), for in such a case there would be exactly the same professional confidence with the one as with the other (*t*). Thus, all cases submitted and opinions taken by a trustee to guide himself in the administration of his trust, and not for the purpose of his own defence in any litigation against himself (by the *cestuis que trustent*) (*u*) must be produced to the *cestuis que trust*, as they are taken for the purpose of the administration of the trust, and for the benefit of the persons entitled to the trust estate, who will have to pay the expense thereby incurred (*x*).

Privilege can only be set up against strangers.

5. The privilege applies to cases of conflict between the

Not applicable to case of testa-

(*l*) See *per* Lord Brougham, L. C., 1 Myl. & K. 102; *per* Lord Lyndhurst, L. C., 1 Phill. 687.

(*ll*) See *Caldbeck v. Boon*, Ir. R. 7 C. L. 32.

(*m*) *Follett v. Jefferyes*, 1 Sim. N. S. 1; *Charlton v. Combes*, 4 Giff. 372; *Gartside v. Outram*, 26 L. J. Ch. 115; see *per* Turner, V.-C., 9 Ha. 392.

(*n*) *Ramsbotham v. Senior*, L. R. 8 Eq. 575.

(*o*) *Per* Lord Cranworth, V.-C., 1 Sim. N. S. 16; see *Charlton v. Coombes*, *supra*.

(*p*) 10 Beav. 51; 11 *ib.* 618. See *Kelly v. Jackson*, 13 Ir. Eq. R. 129.

(*q*) *Mornington v. M.*, 2 J. & H. 697; *Charlton v. Coombes*, 4 Giff. 372.

(*s*) See *Warde v. W.*, 3 Macn. & G. 365; *Ford v. De Pontes*, 7 W. R. 299 (solicitor employed by husband and wife).

(*t*) *Per* Lord Cranworth, V.-C., 1 Sim. N. S. 27.

(*u*) See *Broun v. Oakshott*, 12 Beav. 252; *Talbot v. Marshfield*, 2 Dr. & Sm. 549; *Bacon v. B.*, 34 L. T. 349.

(*x*) See *per* Romilly, M. R., *Wynne v. Hamberston*, 27 Beav. 421, 423—4; *Devaynes v. Robinson*, 20 *ib.* 42; *Talbot v. Marshfield*, 2 Dr. & Sm. 549; *Mason v. Cattley*, 22 Ch. D. 609; *Woods v. W.*, 4 Ha. 83.

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mentary dis-
positions of
client.

client or those claiming under him and third persons, but not to the case of testamentary dispositions by the client (the disclosure of which can affect no right or interest of his) as between different parties, all of whom claim under him, *e.g.*, as between the executors and the next of kin (*y*). Where the question arises as between two parties claiming equally under the client, it would be arbitrary to hold that it belongs to one of them rather than to the other (*z*).

Communica-
tions through
agents for com-
munication.

The rule extends not merely to a communication made to the professional agent himself by the client directly, it goes to *all communications made by the client to the solicitor through intermediate agents*, and he is not bound to write letters through the post, or to go himself personally to see the solicitor; he may employ a third person to write the letter, or he may send the letters through a messenger, or he may give a verbal message to a messenger, and ask him to deliver it to the solicitor (*a*). The agent must, however, be *employed* on the part of the client *to obtain the legal advice or assistance*, in which case he stands in exactly the same position as the client as regards protection, and not a mere general agent or representative, *e.g.*, a surveyor (*b*). Information given and documents communicated to the solicitors by third parties, not as agents of the clients seeking advice, are not protected, because they contain information required or asked for by the solicitor for the purpose of enabling him the better to advise the client (*c*). The cases, no doubt, establish that such documents are protected where they have *come into existence after litigation commenced or in contemplation*, and when they have been made *with a view to such litigation* (*d*), either for the purpose of obtaining advice as to such litigation, or of obtaining evidence to be used in such litigation, or of obtaining information which might lead to the obtaining of such evidence, but it has never hitherto been decided that documents are protected merely because they are produced by a third person in answer to an inquiry made by the solicitor (*e*).

**II. Informa-
tion obtained**

The second class of privileged communications comprises

(*y*) *Russell v. Jackson*, 9 Ha. 387.

(*z*) See *per* Turner, V.-C., *ib.* 393.

(*a*) *Per* Jessel, M. R., 2 Ch. D. 649; 17 *ib.* 682; *Hooper v. Gumm*, 2 J. & H. 602.

(*b*) *Wheeler v. Le Marchant*, C. A., 17 *ib.* 675, 684, *per* Cotton, L. J.

(*c*) *Ib.* See *Original Hartlepool Coll. v. Moon*, 30 L. T. 585.

(*d*) See *M'Corquodale v. Bell*, 1 C. P. D. 471, *post*, p. 57.

(*e*) *Per* Jessel, M. R., 17 Ch. D. 681.

information obtained and documents prepared during an actual or in contemplation of an anticipated litigation and for the purposes thereof, either (1) *by the solicitor himself and his agents*, or (2) *by the client or his agents at the request and by the directions of the solicitor*, or (3) *by the client or his agents, without any previous request by the solicitor, but for the purpose of being laid before him for his advice or consideration* (f), such information and documents being substantially rough notes for the case to be laid before the legal adviser, or to supply the proof to be inserted in the brief, in other words "*materials for the brief*" (g), which the opponent has no more right to see than the brief itself (h). In order to be privileged, such documents must be *in some way connected with the solicitor and the conduct of the litigation*; they must be in some sense his work and not independent communications with third persons (i); *they must have been specially created, either by him directly or indirectly, or for communication to him* (k).

The most obvious form of privilege is when any litigant sends either directly or indirectly to his solicitor a document for the purpose of obtaining his advice, or for the purpose of enabling him to institute or defend an action (l). Again, the solicitor's acts must be protected for the sake of the client. The solicitor requires further information, and says, "I will obtain it from a third person." That is confidential. It is *obtained by him as solicitor for the purpose of the litigation*, and it must be protected on the same ground, otherwise it would be dangerous, if not impossible, to employ a solicitor (m). You cannot ask him [or the client] (n) what the information he obtained was (nn). There is another class of cases, where information or evidence, which is usually obtained by the solicitor himself, is not obtained by him, but a document stating what evidence can

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for purposes of
the litigation.

By solicitor
himself.

(f) See *per* Jessel, M. R., 2 Ch. D. 649—650.

(g) See *per* Blackburn, J., L. R. 7 Q. B. 771; *per* James, L. J., 2 Ch. D. 656; *per* Brett, L. J., 3 Q. B. D. 320; *per* Cotton, L. J., 17 Ch. D. 684.

(h) See *per* James, L. J., *ubi supra*; see, as to the privilege of the papers in the action, *Walsham v. Stanton*, 2 H. & M. 1; *Nicholls v. Jones*, *ib.* 588; *Manser v. Dix*, 1 K. & J. 451.

(i) See *Maden v. Vecvers*, 7 Beav. 489.

(k) See *Southwark Water Co. v. Quick*, C. A. 3 Q. B. D. 315.

(l) *Per* Cotton, L. J., 3 Q. B. D. 322.

(m) See *Curling v. Perring*, 2 Myl. & K. 380; *Simpson v. Brown*, 33 Beav. 482.

(n) See *Kennedy v. Lyell*, C. A., 48 L. J. 455; *ante*, p. xxxv.

(nn) *Per* Jessel, M. R., 2 Ch. D. 649—50; see *M'Corquodale v. Bell*, 1 C. P. D. 471.

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be given is prepared to be communicated to the solicitor (o). If you ask your agent to give you information respecting the evidence which can be given by a person who is to be a witness, or to draw up a case for the opinion of your counsel or solicitor, his communication for that purpose is privileged (p). But a communication from a mercantile agent to his principal giving information as to what the agent had actually done for and on account of the principal is not privileged, because it is sent in compliance with the request of the principal given after the principal has been threatened with litigation respecting the matter on which he requires information (q).

By agents of
solicitor.

The solicitor is not bound any more than the client to do the work himself. He is not bound either to collect information or to collect testimony. He may employ his clerks or other agents to do it for him, and upon the same principle as the information acquired by himself directly is protected, so the *information acquired by a clerk or agent employed by him is equally protected* (r).

By client or his
agents, as
agents for
solicitor.

But then the cases go still a step further. Suppose the information required is in a foreign country, where neither the solicitor nor his clerk nor an ordinary agent can obtain it, he may request the client to obtain it himself, and then the *information obtained by the client at the request or under the advice of the solicitor* is in a sense obtained by the agent of the solicitor (s). * * * It is turning the client, so to say, into the agent of the solicitor for the purpose of obtaining information; but it is clearly within the rule of privilege (t). The fact that the agent you employ is in fact employed at the request and direction of your solicitor to obtain information for him brings the case within the rule (u). If a solicitor asks the client to send somebody to collect information, it is the same thing as if the solicitor himself

(o) *Per* Cotton, L. J., in *Southwark Water Co. v. Quick*, 3 Q. B. D. 315, 322; see also *Pacey v. Lond. Tramways Co.*, 2 Ex. D. 440 n.; *Friend v. L. C. & D. Ry. Co.*, *ib.* 437; the *Theodor Korner*, 3 P. D. 162; *per* Mellish, L. J., 2 Ch. D. 658—9.

(p) See *per* Mellish, L. J., 2 Ch. D. 658—9; *per* Jessel, M. R., *ib.* 648.

(q) *Anderson v. Bank of British Columbia*, C. A., 2 Ch. D. 644. See *Westinghouse v. Midland Ry. Co.*, 48 L. T. 98, 462 (C. A.).

(r) *Per* Jessel, M. R., 2 Ch. D. 650.

(s) See *Reid v. Langlois*, 1 Macn. & G. 627; *Ross v. Gibbs*, L. R. 8 Eq. 522.

(t) *Per* Jessel, M. R., 2 Ch. D. 650. See *Steele v. Stewart*, 1 Ph. 471; *Lafone v. Falkland Isl. Co.*, 4 K. & J. 34, 36, *per* Wood, V.-C.

(u) *Per* Jessel, M. R., 2 Ch. D. 653.

had written to a person in foreign parts asking for information (uu). The true test in such cases is, not whether the person who is at a distance, and communicates the information in question, is the agent of the solicitor and sent out by him, or the agent of the party, and sent out by him, for he may have been sent out by the party, and yet, in collecting the information, he may have acted under the direction and as the agent of the solicitor—but, *whether such person in transmitting that information was discharging a duty which properly devolved upon the solicitor, and which would have been performed by the solicitor if the circumstances of the case had admitted of his performing it in person (x)*. The privilege in such a case depends upon the purpose for which, and the circumstances under which, it was obtained, and not exclusively upon the character of the person who actually obtained it (y).

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Test as to
privilege in
such cases.

It is not, however, necessary that the information or the documents should have been obtained at the instance, or at the request, or by the direction, of the solicitor; it is enough if they come into existence *merely for the purpose of being laid before him for his advice or consideration (z)*. If a document comes into existence for the purpose of being communicated to the legal adviser with the object of obtaining his advice, or of enabling him to prosecute or defend an action, then it is privileged, because it is something done for the purpose of serving as a communication between him and the client (a), and it makes no difference that the document was not, as a matter of fact, ultimately laid before the legal adviser for his advice or consideration (b). If at the time the document is brought into existence its purpose is that it should be laid before the solicitor, if that purpose is true and clearly appears upon the affidavit, it is not taken out of the privilege merely because afterwards it was not laid before the solicitor. It might not have been laid before him, because

Sufficient if
information
obtained for
purpose of
being laid be-
fore solicitor.

(uu) *Ib.* 652.

(x) *Per* Wood, V.-C., in *Lafone v. Falkland Isl. Co.* (No. 1), 4 K. & J. 34, 36, cited with approval by Jessel, M. R., in *Anderson v. Bank of British Columbia*, C. A., 2 Ch. D. 644, 652, where all the cases are reviewed, and which is the leading case upon this branch of privilege. See also *per eund.* in *Wheeler v. Le Marchant*, C. A., 17 *ib.* 675, 682.

(y) See *per* Wigram, V.-C., 1 Ha. 533.

(z) *Southwark Water Co. v. Quick*, C. A., 3 Q. B. D. 315. Distinguish *Westinghouse v. Midland Ry. Co.*, 48 L. T. 98, 462 (C. A.).

(a) See *per* Cotton, L. J., 3 Q. B. D. 322, 323.

(b) *Southwark Water Co. v. Quick*, C. A., 3 Q. B. D. 315.

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the person making the statement had died or went away and could not be found (c). But it is not enough that the document should have been prepared *with a view to possible litigation*, and in the event thereof, of being laid before the solicitor (cc).

Where no
solicitor
employed.

In *Anderson v. British Bank of Columbia* (d), Lord Justice Mellish expressed an opinion that in cases where no solicitor is employed but a man acts as his own solicitor, *information* obtained by him, before deciding upon bringing or defending an action, *respecting the evidence which could be given by a person who was to be a witness*, would be just as much privileged as if it had been obtained after the action was commenced. At any rate, it is not necessary that a solicitor should have been actually retained or consulted at the time (e).

Party must
answer as to
acts or know-
ledge of agents.

A party is not, however, exempted from the liability to disclose, *in answer to interrogatories*, information communicated to him by non-legal agents, or information as to matters of fact even though communicated by legal agents (f), for the purpose of the litigation, though that information were contained in documents which would themselves be privileged, as he is bound, if necessary, to procure information for the purpose of answering, and the knowledge of the agent in the matter of the agency, is or ought to be the knowledge of the principal (g). The general principle is, that whatever a party to a suit knows respecting the matter in dispute his adversary has a right to know; that being considered the best means of working justice (h), and though it might perhaps appear reasonable that as soon as parties are in litigation, or even in controversy upon those matters which become the subject of the suit, what each party gets for the purposes of the suit should be protected, that is not the rule (i).

Papers in
action privi-
leged unless
publici juris.

Drafts of pleadings, affidavits, and deeds are privileged, though the pleadings and affidavits themselves, after being

(c) *Per Brett, L. J.*, 3 Q. B. D. 320: see *per Cockburn, C. J.*, *ib.* 318.

(cc) *Westinghouse v. Midland Ry. Co.*, 48 L. T. 98, 462 (C. A.).

(d) 2 Ch. D. 644, 658 *seq.* See *per Lord Cottenham, L. C.*, 1 Myl. & Cr. 527.

(e) See *Southwark Water Co. v. Quick*, 1 Q. B. D. 315.

(f) See *Kennedy v. Lyell, C. A.*, 48 L. T. 455.

(g) See *per Cotton, L. J.*, 3 Q. B. D. 321, and the judgments of the Lord Justices in *Anderson v. Bank of Brit. Columbia*, 2 Ch. D. 644, 654.

(h) *Per Kindersley, V.-C.*, 2 Dr. & Sm. 392.

(i) *Ib.* See *Anderson v. Bank of Brit. Columbia*; *English v. Tottie*, 1 Q. B. D. 141; *Secus*, where the information amounts to "materials for brief" (v. ante, p. 57); *Kennedy v. Lyell, C. A.*, 48 L. T. 455.

filed and delivered, become *publici juris*. Briefs are, in strictness, not privileged, so far as they are copies of matters otherwise *publici juris*, but the production cannot extend to observations, notes, or marks by counsel which may have been made upon them (*k*). Indorsements on briefs are *publici juris*, and must be produced, as being the record of what took place in open Court, as also short-hand writer's notes of proceedings in court, but observations and notes made thereon are privileged (*l*).

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All communications not coming within one of the above-mentioned heads, are unprivileged, even though made between the parties themselves, or the parties and their agents *confidentially and in contemplation of or during litigation and with reference to the subject-matter thereof*, nay, even for the express purpose of maintaining and defending it, and at the party's own expense (*m*), there being no necessity for such communications, and, therefore, no privilege (*mm*).

The privilege is not confined to the continuance of the action or other legal proceeding in which the communication may have been originally made (*n*), the rule being "once privileged always privileged" (*o*); it applies, therefore, *a fortiori*, where the succeeding proceedings are substantially the same as the former, *i.e.*, involve or embrace the same issues (*p*). Thus, a case stated with respect to the same property as that which was the subject of the suit in which the privilege was claimed, and after the dispute which terminated therein had arisen, was held privileged, though stated with reference to a separate litigation (*q*). In the

Once privileged always privileged.

Cross-actions.

(*k*) *Walsham v. Stainton*, 2 H. & M. 1; *Manter v. Dix*, 1 K. & J. 451.

(*l*) *Nicholls v. Jones*, 2 H. & M. 588; *Plumley v. Horrell*, W. N. 1868, 240; *Nordon v. Defries*, 8 Q. B. D. 508; see *Tyas v. Brown*, 42 L. T. 501.

(*m*) *Bustros v. White*, C. A., 45 L. J. Q. B. D. 642, 1 Q. B. D. 423; *Anderson v. Bank of British Columbia*, C. A., 2 Ch. D. 644; *Martin v. Butchard*, 36 L. T. 732 (correspondence between principals and agents); *Goodall v. Little*, 1 Sim. N. S. 155; *Reid v. Langlois*, 1 Macn. & G. 638 (communications between co-defendants); distinguish *Hamilton v. Nott*, L. R. 16 Eq. 112 (where one defendant was employed to collect evidence on behalf of the common solicitor), and *Jenkyns v. Bushby*, 2 ib. 547 (letter written to a co-defendant with directions to forward it to the solicitor held privileged); *Wright v. Vernon*, 1 Drew. 344 (information obtained for express purpose of suit at party's own expense).

(*mm*) See per Lord Brougham, L. C., 1 Myl. & K. 101.

(*n*) *Bullock v. Corry*, 3 Q. B. D. 356; *Nordon v. Defries*, 8 ib. 508; *Bacon v. B.*, 34 L. T. 349; *Chant v. Brown*, 7 Ha. 79, 86.

(*o*) Per Cockburn, C. J., 3 Q. B. D. 358.

(*p*) *Holmes v. Baddeley*, 1 Phill. 476; *Thompson v. Falk*, 1 Drew. 21; *Nordon v. Defries*, 8 Q. B. D. 508; *Chant v. Brown*; *Bacon v. B.*, *ubi supra*.

(*q*) *Jenkyns v. Bushby*, L. R. 2 Eq. 547.

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case of cross-actions, what passed between the solicitors and clients in both actions would clearly be privileged, and in the case of two actions by the same plaintiff against different defendants, viz., A. v. B. and A. v. C., the subject-matter of the two actions being substantially the same, communications between solicitor and client in the action against B. would be privileged in the action against C. (*r*). In these cases the matters in dispute are so immediately connected that confidential communications in the one action ought to be protected in the other (*s*). So in a case where the facts in both actions are identical, and the defendants in the latter action are in the same position as the plaintiffs were in the former action, for the fact of their positions being reversed cannot affect the privilege (*t*). In such cases it is obvious that either the communications in question do not relate to the subject of the present proceedings, in which case they are *irrelevant*, or, if they do so relate, that they are privileged (*u*).

Form of claim
of privilege.

It is not enough that the affidavit of documents in which the objection is taken should simply state "that the documents are privileged" (*x*); or that the deponent is *advised and insists* that they are so (*xx*); it should state and verify the facts upon which the objection is grounded (*y*). A claim of privilege on the ground that the party obtained the information "either as the solicitor or in some other capacity" will be taken most strongly against the party making it, and it will be assumed that he obtained the information in the latter capacity (*yy*). No presumptions should be made against the party insisting on the privilege from the fact of his doing so (*z*).

Any question of privilege, not governed by authority,

(*r*) See *Jenkyns v. Bushby*, *supra*.

(*s*) *Per* Cockburn, L. C. J., in *Bullock v. Corrie*, 47 L. J. Q. B. 352, 353.

(*t*) *Ib.* See *Nordon v. Defries*, 8 Q. B. D. 508, where shorthand notes of the proceedings at a former trial were held privileged in a subsequent trial arising out of the same subject-matter.

(*u*) *Ford v. De Pontes*, 7 W. R. 299, 300, *per* Romilly, M. R.

(*x*) *Gardner v. Irvin*, C. A., 4 Ex. D. 49. Forms of claim of privilege on this ground will be found in the *Append. post*, p. 193. It is the common practice to afford the objecting party an opportunity of amending an imperfect claim of privilege.

(*xx*) *Balguy v. Broadhurst*, 1 Sim. N. S. 111.

(*y*) *Gardner v. Irvin*, 4 Ex. D. 49.

(*yy*) *Thomas v. Rawlings*, 27 Beav. 140; see *Nordon v. Defries*, 8 Q. B. D. 508.

(*z*) See *per* Lord Chelmsford, *Wentworth v. Lloyd*, 10 H. L. 589.

should be decided by considering the object and foundation of the rule, and inquiring whether it is *reasonably necessary*, either as a result of the principle which regulates the privilege or for the convenience of mankind, to extend it to the particular case (a). Thus, it has been decided, as we have already seen, that the communications between a testator and his legal adviser with regard to the testamentary dispositions of the former are not privileged from disclosure after the client's death (b).

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SECT. 6.—*Of the objection that the discovery is not sought boná fide.*

The discovery sought may be *technically* material, but it may be objected that it is not sought *boná fide* for the purpose of assisting the party seeking it in proving his case at the trial of the action (c), thus constituting an abuse, or at least a misuse, of the process of the Court (d). It is very important to see that production is not ordered as mere matter of curiosity. It is ordered for the purpose of furthering the administration of justice, to enable the parties to ascertain the truth and submit it to the Court, to enable it to adjudicate properly on the case; therefore a mere motion to produce documents from motives of curiosity will not be attended to. *It must be shown that there is some practical utility in the production (e).* In *Cardale v. Watkins* (f) Vice-Chancellor Leach said, "The purpose for which discovery is given, is the aid of some proceeding pending or intended, and not to satisfy curiosity; and *if such purpose be not stated in the bill* a demurrer will lie." The party seeking the discovery must show that he stands in need of it for the *legitimate purposes of the litigation (g)*. Accordingly, an old case, inspection of books was refused where it was sought for the purposes of the applicant's trade (h), and an

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Discovery not
granted to
satisfy cu-
riosity.

(a) See *per* Jessel, M. R., 17 Ch. D. 681; *per* Kindersley, V.-C., 4 Drew. 490; *per* Turner, V.-C., 9 Ha. 391; *per* Wood, V.-C., 2 J. & H. 605.

(b) *Russell v. Jackson*, 9 Ha. 387.

(c) See *per* Jessel, M. R., 8 Ch. D. 652.

(d) See *per* Cotton, L. J., 3 Q. B. D. 664.

(e) See *per* Malins, V.-C., L. R. 19 Eq. 45.

(f) 5 Madd. 18.

(g) See *per* Wigram, V.-C., 8 Ha. 112.

(h) *Lingen v. Simpson*, Madd. & G. 290.

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application by a remainderman for the inspection of title-deeds in the possession of the tenant for life was refused, where the object was to facilitate a contemplated mortgage by him of his interest in the property to which they related (*i*).

Vexatious interrogatories.

Interrogatories should be such as tend *bond fide* to support the case of the party seeking to administer them, and to favour a complete inquiry into the truth of the issue which the Court has to decide (*k*). If they are administered *malâ fide*, or with a vexatious or improper purpose, an answer will not be enforced (*l*). Where interrogatories *tend to criminate or discredit* the party interrogated, it is the duty of the Court to see in the first place that they are put *bond fide* for the purpose of assisting the case made by the party interrogating, and secondly, that they are put for the purpose of supporting not a mere fishing case, but a definite case which is alleged on the pleadings, and proposed to be supported in evidence (*m*). Thus, interrogatories asking the defendant whether he had not published a libel were disallowed, where put for the purpose of criminating the defendant, and not *bond fide* for the purpose of assisting the case (*n*).

Discovery with a view to ulterior proceedings or for sake of costs or delay.

Again, discovery will not be given where it is in reality sought for the purposes of getting evidence to be used in another action or proceeding, or finding out some person against whom to bring an action (*o*), or is unnecessary and useless and only sought for the purpose of swelling costs or causing delay (*p*), for it was not intended by the rules to make the delivery of interrogatories a mere matter of course, whether necessary for the purposes of the action or not, and if the judge be satisfied that there is no reasonable object in delivering them, he is perfectly justified in striking

(*i*) *Shaw v. S.*, 12 Price, 163. See *Rippin v. Dolman*, 2 W. R. 432.

(*k*) See *per* Sir R. Phillimore, L. R. 2 A. & E. 322.

(*l*) See *per* Channell, B., in *McFadzen v. Corp. of Liverpool*, L. R. 3 Ex. 279, 281; *Bickford v. Darcy*, 1 *ib.* 354, 4 H. & C. 534 (explaining *Baker v. Lane*, 3 *ib.* 544).

(*m*) See *per* Thesiger, L. J., 8 Ch. D. 655; *per* Brett, J., L. R. 10 C. P. 234 *seq.*

(*n*) *Edmunds v. Greenwood*, L. R. 4 C. P. 70. See *Waters v. Lord Shaftesbury*, 12 Jur. N. S. 3.

(*o*) *Temperley v. Willett*, 6 E. & B. 380; *Cox v. Bockett*, 18 C. B. N. S. 241; *Lee v. Read*, 5 Beav. 381.

(*p*) See *Bechervaise v. G. W. R.*, L. R. 6 C. P. 35; *Alexandra Dock Co. v. Elliot*, 23 L. T. 847; *Bray v. Finch*, 1 H. & N. 468; *The Biola*, 34 L. T. 125; *Newall v. Telegraph Co.*, L. R. 2 Eq. 756; *Lloyd v. Adams*, 4 K. & J. 467.

them out (*q*). Interrogatories are improper and illegitimate which are intended to obviate the necessity of calling a witness at the trial, and so unfairly withdrawing him from cross-examination (*r*), or to deter the party interrogated from coming forward as a witness (*s*); interrogatories as to the contents of documents might be improper, if intended to get over the difficulty of their being unstamped. The objection must, ordinarily, be taken in the answer (*t*), but where interrogatories as a whole are so utterly irrelevant as to appear not to have been *bond fide* delivered, the party called upon to answer them might perhaps get them struck out under Ord. XXXI. r. 5, and so relieve himself of the necessity of raising the objection by answer (*u*).

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Sect. 6.

Unfair object.

SECT. 7.—*That the discovery would be contrary to Public Policy.*

No one can be compelled to give evidence [or to produce documents] relating to any affairs of State, or as to official communications between public officers upon public affairs, except with the permission of the officer at the head of the department concerned (*x*). This protection is given, firstly, on the ground of public policy, *i.e.*, the danger to the public interest which might result from their production (*y*), and secondly, because matters of State are exempted from municipal jurisdiction (*z*). Documents, which are not themselves of a character to justify a refusal to produce them on that ground, are not to be withheld merely because they are connected or associated with documents so privileged (*a*), and

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Affairs of state
and official
communica-
tions privi-
leged.

(*q*) See *per James*, L. J., 1 Q. B. D. 443—4. The proper mode now is to take the objection in the answer, in the case of one or more of several interrogatories, the power of striking out being restrained to the cases where the delivery of interrogatories at all is objected to as unreasonable or vexatious (*v. post*, p. 72).

(*r*) See *Hodsoll v. Taylor*, L. R. 9 Q. B. 79.

(*s*) See *Stocks v. Ellis*, L. R. 8 Q. B. 452.

(*t*) See *form, post*, p. 190.

(*u*) See *per James*, L. J., in *Allhusen v. Labouchere*, C. A., 3 Q. B. D. 654, 659; *per Cotton*, L. J., *ib.* 664.

(*x*) *Stephen*, Dig. Ev. Art. 112, citing *Beatson v. Skene*, 5 H. & N. 838; *Kerr*, 147—8; *Tayl. Ev.* s. 947; *Wadeer v. East India Co.*, 8 De G. M. & G. 182, 187; *Smith v. East India Co.*, 1 Phill. 50; *M'Elveney v. Connellan*, 17 Ir. C. L. Rep. 55.

(*y*) See *Wadeer v. East India Co.*

(*z*) *Per Turner*, L. J. *ib.* 191.

(*a*) *ib.* 191.

CHAP. IV.
Sect. 7.

Privilege must
be claimed by
head of depart-
ment.

What state-
ment requisite.

Privilege of
judges and
arbitrators.

official correspondence is not privileged as such unless it passed under particular and special circumstances (b). The question whether the production of any particular document would be injurious to the public service, must be determined not by the judge, or other tribunal, before whom the question of production is raised, but by the *head of the department* having the custody of the documents (c), and if he (which may be done by affidavit) states that, in his opinion, the production of it would be injurious to the public service, the judge ought not to compel production of it (d). It is not sufficient for him to state that he has certain official documents, and objects to state anything farther with respect to them on the ground of public policy (e); he must pledge his opinion, as a responsible act by a responsible person, that their production would be injurious to the public service, and it should be shown that the mind of the head of the department has been brought to bear upon the particular question (f). Where the objection is made, the Court will not order the production of part only of the document, the other part being sealed up from inspection (g), and a party may decline to answer interrogatories as to the contents of documents so privileged on the same grounds as he may decline to produce the documents themselves (h), nor can secondary evidence be given of their contents (i).

It is upon this ground that judges and arbitrators are, in the absence of fraud, mistake, or misconduct, privileged from disclosing the grounds of their decisions (k).

SECT. 8.—*Of the objection on the ground of being a bond fide purchaser for value.*

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Bond fide
purchaser for
value.

It was a principle of equity that if a defendant had in conscience as good a title to property in his possession as the

- (b) *Smith v. East India Co.*, 1 Phill. 50, 54, *per* Lord Lyndhurst, L. C.
- (c) *Beatson v. Skene*, 5 H. & N. 838; *H. M. S. Bellerophon*, 2 Mar. Law Cas. N. S. 449 (*v. ib.* for a form of affidavit); *Dixon v. Small Arms Co.*, *ib.* 450.
- (d) *Ib.*
- (e) *Kain v. Farrer*, 37 L. T. 469.
- (f) *Ib.*
- (g) *H. M. S. Bellerophon*, 2 Mar. Law Cas. N. S. 449.
- (h) Tayl. Ev. s. 948; *Fitzgibbon v. Greer*, Ir. Rep. 9 C. L. 294.
- (i) *Stace v. Griffith*, L. R. 2 P. C. 420.
- (k) See *Padley v. Lincoln Waterworks*, 2 Macn. & G. 68; *Ponsford v. Swaine*, 1 J. & H. 433; *Duke of Buccleugh v. Metropolitan Board*, L. R. 5 H. L. 518; *Re Dare Valley Ry.*, *ib.* 6 Eq. 429.

person who sought to deprive him of it, though he might want a perfect *legal* title, the Court would not compel him to give to the plaintiff any assistance to the defeasance of his own title (l). Thus, the fact that the defendant in an action is a *purchaser for value without notice* of the property claimed is a good ground of objection to giving any discovery sought in the action, whether of documents or otherwise, which might impeach his *de facto* title (m), and the rule applies whether the plaintiff is asserting a legal or equitable title (n). In *Pilcher v. Rawlings* (o) Lord Justice James said, "My view of the principle is, that when once you have arrived at the conclusion that the purchaser is a purchaser for valuable consideration without notice, the Court has no right to ask him, and has no right to put him to contest the question, how he is going to defend himself, or what he is going to rely on. He may say, honestly, 'I am not going to tell you. I have got the deeds; I defend them, and you will never be able to make me produce them, and you will never be able to produce secondary evidence of them. I am not obliged to produce them at all. * * * I have a right to rely, as every person defending his position has, on the weakness of the title of the person who is seeking to displace me.'" Thus, inspection was refused to a demandant in dower of a deed of her deceased husband conveying the land on which her claim was made to a *bonâ fide* purchaser for valuable consideration without notice of her claim (p). The defendant must, however, produce any documents or answer any interrogatories which tend to impeach or disprove the validity of the defence set up, *e.g.*, by showing that there was no valuable consideration for the purchase, or affecting him with constructive notice of the plaintiff's title (q); he may be interrogated and tested to any extent as to the valuable consideration which he has given in order to show the *bona fides* or *mala fides* of his purchase, and also the presence or the

Not obliged to discover his title.

Must give discovery impeaching his defence.

(l) See Hare, Part II. Ch. 3.

(m) Dan. (ed. 6) 492 *seq.*, citing Dart, V. & P. 832 *seq.*; *Bassett v. Norworthy*, 2 Lead. Cas. Eq. 1; *Hunt v. Elmes*, 27 Beav. 22. It is no longer a defence to a *legal* claim for the delivery up of deeds (*Cooper v. Vesey*, C. A., 20 Ch. D. 611).

(n) See *Gomm v. Parrott*, 3 C. B. N. S. 47.

(o) L. R. 7 Ch. App. 259, 269 *seq.*

(p) *Gomm v. Parrott*, *ubi supra*.

(q) *Jerrard v. Saunders*, 2 Ves. 187; *Walwyn v. Lee*, 9 *ib.* 24; *Neesom v. Clarkson*, 2 Ha. 166 n., Coop. P. C. 93; *Addis v. Campbell*, 1 Beav. 258.

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absence of notice (*r*). The former rule was that if the purchase-deed was *pleaded* the plaintiff was entitled to see it, upon the principle noticed in a subsequent part of this work (*s*), but otherwise he was not entitled to production of it before the trial, unless there were suspicious circumstances or fraud in connection with it (*t*). Under the new practice, a defendant is, as will be seen, expressly exempted from the liability to produce documents relating to his own title, although referred to by him in his defence (*u*). It is conceived, however, that the defendant would be bound to make an affidavit giving a list of the protected documents, though not to produce them or describe their contents in answer to interrogatories (*x*).

(*r*) See *per James*, L. J., L. R. 7 Ch. App. 269.

(*s*) *Hunt v. Elmes*, 27 Beav. 62; *post*, p. 122 (*g*).

(*t*) *Ex parte Caldecott*, Mont. 55; *Kennedy v. Green*, 6 Sim. 6. But it has been said that it should be produced to shew whether it comprises the property claimed (see *Aston v. A.*, 3 Atk. 302).

(*u*) *Post*, p. 124. But query how far such a defendant can be said to have any title (see *per Lord Eldon* in *Walwyn v. Lee*, 9 Ves. 24).

(*x*) See *Petrie v. P.*, 3 Atk. 510; *post*, p. 166.

CHAPTER V.

DISCOVERY BY INTERROGATORIES.

SECT. 1.—*Form of Interrogatories.*

ANY discovery which, before the passing of the Judicature Acts, could have been obtained by a bill of discovery in the Court of Chancery, can now be obtained by means of interrogatories delivered in an action in any division of the High Court (*a*). Generally speaking, every party to a litigation has a right to administer interrogatories for the examination of his opponent (*b*), (although it was not intended by the new Rules to make the delivery of them in all cases a matter of course (*c*)), and, subject to the liability of having them struck out under Order XXXI. r. 5, and to the check placed upon them by Order XXXI. r. 2, any questions may be put, leaving the party interrogated to object, if he can, to answer them upon any grounds which, according to the law of the land, entitled him to do so (*d*). Rule 1 of Order XXXI. enables either party generally and without restriction, to administer interrogatories to the other, but the effect of the decisions (*e*) seems to be to add to the word "interrogatories," in rule 1 of Order XXXI., the words "such as would have been allowed in Chancery before the passing of the Judicature Acts" (*ee*). Plaintiffs and defendants have the periods inter-

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Right to deliver
interrogatories
generally.

(*a*) *Ramsden v. Brearley*, 33 L. T. 322; *Lefroy v. Burnside*, 4 L. R. Ir. 340; *Lyell v. Kennedy*, C. A., 20 Ch. D. 484; 52 L. J. Ch. 385 (H. L.); *A.-G. v. Gaskill*, C. A., *ib.* 519. Interrogatories may be administered in an action in aid of which a bill of discovery would have been demurrable, *e.g.* an action for a personal tort (see *Fisher v. Owen*, C. A., 8 Ch. D. 645, 650), but not by an informer in an action for penalties, (see *Hunnings v. Williamson*, 10 Q. B. D. 459).

(*b*) *V. ante*, p. 3.

(*c*) *Per James*, L. J. 1 Q. B. D. 443.

(*d*) *See per James*, L. J., 3 Q. B. D. 658; *per Cotton*, L. J., 20 Ch. D. 528, 3 Ex. D. 337; *per Stephen*, J., 31 W. R. 337.

(*e*) *See Lyell v. Kennedy*, *supra*.

(*ee*) *Per Stephen*, J., 31 W. R. 337.

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Sect. 1.

When order
necessary,

Costs of appli-
cation for leave
to deliver.

Form of inter-
rogatories.

vening between the delivery of their statements of claim or defence respectively, and the close of the pleadings, within which to deliver interrogatories *as of right* (*f*), but if either of them wishes to do so at an earlier or a later period he must obtain an order for that purpose. An order is also necessary when the party whom it is desired to interrogate is a body corporate, joint-stock company, or other body of persons empowered by law to sue or be sued in its own name or the name of an officer or other person (*ff*), the object of requiring such an order being to insure that a proper person is selected to answer, and, lastly, where it is desired to administer a second or further set of interrogatories to the same person (*g*). Where the obtaining an order is rendered necessary by the laches of the applicant he is usually ordered (in the Queen's Bench Division) to pay to the opposite party 6s. 8d., costs of the summons (*h*). In the case of applications for leave to deliver a further set, or to deliver them before or after the prescribed period, an affidavit in support should, as a rule, be made (*i*). The order will be general in its terms, *i.e.*, to deliver interrogatories generally; and the propriety or otherwise of the interrogatories proposed to be administered will not be gone into at the hearing of the application (*k*). Interrogatories are not required to be printed, whatever may be their length, or signed by counsel (as in the Court of Chancery), or written upon paper of any particular size or description. A statutory form, which is to be followed "with such variations as the circumstances may require" is provided by the rules (*l*). They are intitled and marked in the same way as pleadings (*m*), and should be concise and simple in form, and such as admit of specific and

(*f*) As a matter of tactics, it is prudent, as a rule, to obtain discovery of documents *before interrogating*, even if the time for doing so of right be thereby allowed to expire, as it may become desirable to interrogate as to the contents of documents, or as to documents suspected to be in the opponent's possession and not disclosed in his affidavit.

(*ff*) Ord. XXXI. r. 5; *v. post*, pp. 159, *seq.*

(*g*) *Ib.* r. 1. See p. 194 for a form of summons.

(*h*) *Cf. Dakins v. Garratt*, 4 Jur. N. S. 579, where the party was ordered in the Court of Chancery to pay 50s. costs in a like case; but see *London Co. v. Davies*, 5 Ch. D. 775.

(*i*) There is a discretion as to requiring one, in such cases (*v. ante*, p. 17).

(*k*) *Berkeley v. Stand. Dis. Co.*, 9 Ch. D. 643; and see *Wilson v. Church*, *ib.* 552; *contra, Hewetson v. Whitt. Life Ins. Co.*, W. N. 1875, 219; *Hall v. L. & N. W. R.*, 35 L. T. 848.

(*l*) *V. Append. post*, p. 189.

(*m*) *Dan.* 406.

categorical answers (n). Care should be taken so to frame them that the party interrogated can put in an answer without an oppressive amount of inconvenience, otherwise, if the party interrogating should afterwards apply for an order for a further and better answer, he may not get the costs of his application, even if successful (o). It is objectionable to comprise in a single interrogatory distinct matters which might more properly have been made the subject of several separate, but consecutive interrogatories (p), though several inquiries may be properly included in the same question if germane to one another (q). If interrogatories are exhibited at improper length, the costs occasioned thereby (including the costs of the answer) may be ordered to be borne by the party interrogating (r). If interrogatories are delivered without leave in a case where leave is requisite, they need not be answered (s), and *semble*, they might be set aside as having been delivered "unreasonably" or "vexatiously" (t). If an application for leave to deliver them at an earlier stage than that indicated by the rules is refused, the summons will be dismissed, and not merely allowed to stand over till the prescribed period has arrived, as no leave will then be required (u). They should not be delivered when a demurrer to the whole of the pleading of the party delivering them is pending (x), but they may still be delivered, if necessary, though default has been made in appearing or pleading by the opposite party (z). Where more than one person is interrogated in the same set of interrogatories, a note should be appended to the foot, stating which of the individual interrogatories each party is required to answer, and no party need answer any other than those so specified (a). There is no necessity to serve them personally, but a copy may be left at the office of the solicitor of the party interrogated (b);

Costs of unnecessary or prolix interrogatories.

Delivery.

(n) Lush, Pr. Vol. ii. p. 857. See *Hustler v. Freeland*, 2 N. R. 396; *Armitage v. FitzWilliam*, W. N. 1876, 56; per Grove, J., 35 L. T. 849.

(o) See per Wood, V.-C., John. 651.

(p) See per Lord Langdale, M. R., 10 Beav. 230; *Higginson v. Blockley*, 25 L. J. Ch. 74.

(q) See *Zambaco v. Cassavetti*, 38 Beav. 503.

(r) Ord. XXXI. r. 2, *v. post*, p. 203.

(s) *Carter v. Leeds, &c. Co.*, W. N. 1876, 11.

(t) *V. post*, p. 72.

(u) *Disney v. Longbourne*, 2 Ch. D. 704.

(x) See *Mercier v. Colton*, C. A. 1 Q. B. D. 442.

(z) *V. post*, (d).

(a) Ord. XXXI. r. 1. Chan. Consol. Ord. Sched. B.

(b) *Bowen v. Price*, 2 De G. M. & G. 899; *Little v. Roberts*, 30 L. T. 367; See Ord. XIX. r. 6.

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Delivery out of
jurisdiction.

delivery to the party's solicitor, however, before appearance, is not sufficient, because he is not then the solicitor *on the record* (c). Where no appearance has been entered for the party interrogated, they may be delivered by filing them with the proper officer in the central office (d). Where it is sought to interrogate a party who is out of the jurisdiction (e), the order made for the service of the writ (f) should also provide for the future service of interrogatories, being expressed, as regards the latter, to come into operation from and after the issuing of the writ, so as to save the expense of a separate application for that purpose (g). In the Court of Chancery interrogatories might be amended, on obtaining an order for that purpose, but no such practice existed in the common law courts, or is provided for by the new rules of practice, the proper course apparently being to obtain leave to deliver a further set instead of amending the original set (h).

SECT. 2.—Of the mode of objecting to interrogatories.

Sect. 2.

Striking out or
setting aside
interrogatories.

The mode in which objections to interrogatories should be taken depends upon the nature of the objection made, *i.e.*, whether it is to the *question being put*, or to an *answer being enforced*. According to the new rules of practice, if the contention of the party interrogated is either that the *interrogatories as a whole* have been exhibited *unreasonably*, (*i.e.*, without any reasonable object) or *vexatiously*, or any particular question is objected to as being *scandalous* (i), (*i.e.*, *scandalous and irrelevant*), application may be made to set them aside *in toto*, in the former case, or strike out the particular question alleged to be objectionable, in the latter (k). Interrogatories which have been delivered *pre-*

(c) *Sankey v. Alexander*, Ir. Rep. 7 Eq. 407.

(d) Ord. XIX. r. 6.

(e) See *Pohl v. Young*, 25 L. J. Q. B. 23.

(f) See Ord. II. r. 4.

(g) *Young v. Brassey*, 1 Ch. D. 277; see Dan. 405. In such a case the order must fix a reasonable time for answering, instead of the usual ten days (*The Emma*, 34 L. T. 742).

(h) V. *ante*, p. 70.

(i) V. *post*, p. 86, as to what is scandalous.

(k) Ord. XXXI. r. 5 (Rs. Nov., 1878, r. 3). The mere fact that interrogatories are open to criticism is no reason for striking them out (*Winters v. Dabbs*, W. N. 1876, 21).

maturely may be struck out as being "exhibited unreasonably or vexatiously" (l), but the mere fact that interrogatories in an action for damage by collision between two vessels, ask for the same information as will be afforded by the Preliminary Act of the party interrogated, is no reason for striking them out under this rule (m). Although it is no longer a ground for applying to strike out or set aside interrogatories that they are irrelevant, or not put *bond fide* for the purpose of the action (n), yet if the whole, or the great majority of them were so utterly irrelevant as to show that they were not administered *bond fide* for the purpose of the action, such an application might be entertained (o). The *onus* in such cases is on the party objecting to show what particular interrogatories offend, or that the whole of them offend, against the provisions of the rule, which must be done by the summons to strike out or set aside, and it is the duty of the Judge or Master to deal with the interrogatories not *en bloc*, but individually (p). Where, however, the great majority of the interrogatories are objectionable, or the objectionable ones are so intermingled with the unobjectionable that it is impossible or very difficult to separate them, the whole may be struck out or set aside, without requiring the party applying to specify those which he objects to in particular (q). After the decision of the Court of Appeal in *Lyell v. Kennedy*, that a plaintiff in an action for the recovery of land founded upon the title was not entitled to deliver interrogatories at all in such an action to the defendant (r), the logical result would have been that such interrogatories should be disallowed from the beginning as "vexatious," and Lord Justice Brett expressed himself to this effect (s), and, following this decision, it was decided that in an action *brought solely to recover penalties*, the Court would not allow the defendant

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Sect. 2.

Utterly irrelevant.

Onus lies on party objecting.

(l) *Per* Pollock, B., *Gay v. Labouchere*, 4 Q. B. D. p. 207; *Fenwick v. Johnston*, W. N. 1876, 54; *Drake v. Whiteley*, *ib.* 55.

(m) *The Radnorshire*, 5 P. D. 172.

(n) See Ord. XXXI. r. 5.

(o) See *per* James, L. J., in *Allhusen v. Labouchere*, 3 Q. B. D. C. A., 654, 659; *per* Cotton, L. J., *ib.*

(p) *Allhusen v. Labouchere*, *supra*.

(q) See *per* Jessel, M. R., in *Fisher v. Owen*, C. A., 8 Ch. D. 645, 652; and the judgments of the Lords Justices in *Allhusen v. Labouchere*.

(r) 20 Ch. D. 484 (reversed upon this point; *v. post*, p. 165).

(s) *Ib.* 491.

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Sect. 2.

Application by
summons at
chambers.

to be interrogated at all, on the ground that such discovery would not have been allowed in the Court of Chancery (*t*).

The application must be made by summons at chambers, within four days from the service of the interrogatories (*u*), and, unless the objection is to the interrogatories as a whole, the summons must, as above stated, specify the particular interrogatories objected to (*x*), (which may be done by number), and the grounds of the objection (*y*). It is not, however, a condition precedent to their being dealt with under this rule that the objectionable ones should be so enumerated, the Master or Judge having a discretion to deal with any which he may consider objectionable if pointed out to him at the time of the application, and the summons or motion may be amended or adjourned, if necessary, to enable the objection to be raised to particular interrogatories (*z*). Where interrogatories are struck out or set aside, it is usually expressed to be "without prejudice to any fresh interrogatories which the party may be advised to deliver" (*a*).

All other objections to be taken in the answer.

In all other cases, and in cases where the party has not availed himself of his right to apply to strike out or amend (*b*), the objection must be taken in the answer, and the ground or grounds of it stated (*c*). It is not the business of the Master or Judge at chambers, before whom objections to interrogatories are brought, to settle the interrogatories (*d*), but they may be weeded or pruned down by him, if he think fit to do so (*e*). Where a Judge has gone through the interrogatories and ordered them to be struck out, upon grounds on which he could rightly exercise a discretion, the Court of Appeal will not interfere with it (*f*).

(*t*) *Hunnings v. Williamson*, 10 Q. B. D. 459. Similar interrogatories were disallowed in one case by Lush, J., at chambers, apparently on the same grounds (*Anon.* W. N. 1875, 219), and allowed in another by Huddleston, J., as being a matter of discretion (*Society of Apothecaries v. Nottingham*, *ib.* 259). See *Chadwick v. Ch.*, 22 L. J. Ch. 329.

(*u*) Ord. XXXI. r. 5.

(*x*) *Allhusen v. Labouchere*, C. A., 3 Q. B. D. 654.

(*y*) *Per* Brett, L. J., 3 Q. B. D. 663. A form of summons is given in the Appendix, *post*, p. 194.

(*z*) *Per* Brett, L. J., *ib.*

(*a*) See *Anon.* W. N. 1876, 23, 39.

(*b*) *V. ante*, p. 72.

(*c*) *Gay v. Labouchere*, 4 Q. B. D. 206; *Fisher v. Owen*, C. A. 8 Ch. D. 645.

(*d*) *Winters v. Dabbs*, W. N. 1876, 21; see *Phillips v. Emmens*, 5 N. R. 248.

(*e*) *Carter v. Leeds, &c. Co.*, *ib.*; *Willon v. Bignell*, *ib.* 1875, 239.

(*f*) See *Fisher v. Owen*, C. A. 8 Ch. D. 645.

SECT. 3.—*Further Interrogatories.*

A party is not at liberty to deliver more than one set of interrogatories to the same party without an order for that purpose (g). CHAP. V.
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In practice the cases in which it is most frequently sought to administer further interrogatories to the same persons are those in which a party has amended his pleadings, raising a fresh claim or defence, and seeks discovery in support of his amended case, or where the party, since the delivery of his original interrogatories, has discovered fresh matter as to which he wishes to interrogate his opponent (h), or it is otherwise important to him that he should do so for the purpose of making out his case (for it is not necessary that he should have discovered new matter) (i), or is in a position to put his questions in a more specific form, not having obtained a satisfactory answer before from a defect in that respect (k). In order to obtain leave he ought to come to the Court with such materials as to show that, *plus* the interrogatories already exhibited, he has a case which entitles him to a further examination of the opposite party, and it will not be granted upon a mere surmise that he may learn something more on a second examination, the maxim being that *nemo debet bis vexari* (l), or where the further discovery must be of the most trivial kind (m), or by way of cross-examination upon the answers already given. Where leave is given to a party who has amended his pleadings to deliver further interrogatories, the original interrogatories having been already sufficiently answered, the further set should be confined to the new matters introduced by the amendment, and should not be repetitions of the former questions (n), as otherwise the party interrogated may

Where pleadings amended.

Or fresh matter discovered.

Further interrogatories should be confined to fresh matter.

- (g) Ord. XXXI. r. 1; *Swire v. Redman*, C. A., 20 S. J. 584.
- (h) *Warden v. Peddington*, 32 Beav. 639; see Ord. XXVII. rr. 1—3, and r. 6. *Semble*, an order to amend the interrogatories should be obtained at the same time as the order to amend the pleading.
- (i) See *Crossly v. Dixon*, L. R. 6 Eq. 332; *Few v. Guppy*, 1 Myl. & Cr. 487.
- (k) *Swire v. Redman*, *ante*. See *Lord Waterford v. Knight*, 3 Cl. & F. 270.
- (l) See *Re Metr. Bank*, C. A. 15 Ch. D. 139.
- (m) See *Mertens v. Haigh*, W. N. 1867, 198.
- (n) *Hill v. N. Ry. of Buenos Ayres*, 41 L. J. Ch. 69; *Drake v. Symes*, 2 De G. F. & J. 81; *Wich v. Parker*, 22 Beav. 59.

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Costa.

decline to answer them on that ground (o), or, *semble*, apply to have them set aside as unreasonable and vexatious (p), but the case is different where the first set has not been sufficiently answered (q). The costs of the application, and the further interrogatories and answers, if not dealt with by the order, would be, as usual, costs in the action; in a case where ambiguity and defects in the form of the first set had rendered it desirable to re-interrogate, the party so applying was ordered to pay the costs of the application (r).

A party cannot, however, by amending his pleading, re-instate himself in any right which he has already lost, *e. g.*, of delivering interrogatories without an order for that purpose (s).

(o) *Hill v. N. Ry. of Buenos Ayres*.

(p) *Drake v. Symes*; *Newry v. Kilmorey*, L. R. 11 Eq. 425.

(q) *Ib.*

(r) *Thompson v. Wynne*, Ir. R. 1 C. L. 600.

(s) *South. Boat, &c. Co. v. Rawlins*, 12 W. R. 285; *Denis v. Rochussen*, 4 Jur. N. S. 298; see Ord. XXXI. r. 1.

CHAPTER VI..

ANSWERS TO INTERROGATORIES.

SECT. 1.—*Form of and requirements as to answers.*

ANSWERS must be signed by the deponents, such signature being affixed or acknowledged in the presence of the person before whom they are sworn (*a*), and, unless the Court otherwise directs, the answers of all persons, except the sovereign of this country and the Attorney-General, as representing the sovereign, and persons exempted by statute from taking an oath, must be put in upon the oath of the parties making them (*b*). Persons entitled to the privilege of peerage in practice answer upon oath, though entitled to protest on honour (*c*). An order will not be made, even under very special circumstances, for taking an answer without oath, unless by consent of the opposite party (*d*), nor can the oath be dispensed with by the agreement of the parties themselves out of Court (*e*). In the Court of Chancery, an infant might answer by guardian or next friend (*f*), an idiot or person of unsound mind (not so found by inquisition) by guardian, and a lunatic (so found) by his committee (if any) or guardian (*ff*). Married women, when suing or sued with their husbands, might either answer jointly with them or, by leave of the Court, put in a

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Answers must
be on oath.

Infants,
lunatics, &c.

Married
women.

(*a*) Ch. Cons. Ord. XV. r. 5.; Dan. 637.

(*b*) Ord. XXXI. r. 6; Dan. 638; *Prioleau v. U. S.*, L. R. 2 Eq. 659, 663 *seq.*, *per* Wood, V.-C. The persons statutorily exempted are Quakers, Moravians, Separatists, ex-Quakers, and ex-Moravians (3 & 4 Wm. IV., c. 49; *ib.* c. 82; 1 & 2 Vict., c. 77), who are permitted to affirm.

(*c*) Cons. Ord. XV. r. 6.

(*d*) *Anon.*, 1 L. J. Ch. (O. S.) 4; see *Bacon v. Turner*, W. N. 1876, 292.

(*e*) See *Pilkington v. Hirmsworth*, 1 Y. & C. 612.

(*f*) Dan. 153; *Crowe v. Bank of Ireland*, 5 Ir. L. R. Eq. 578; *Ripplin v. Dolman*, 2 W. R. 432.

(*ff*) Dan. 158 *seq.* *Secus*, in case of mere bodily illness (*Willyams v. Hodge*, 1 H. & T. 575).

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separate answer (*g*). If the husband was unable to procure the wife to concur in a joint answer, he might apply for an order to that effect, and that he might be discharged from any further liability for her default (*h*). If a party dies before answering, and the action is continued against his executors, their answer will be sufficient (*i*).

Printing
answer.

A form which may be used "with such variations as circumstances may require," is provided by the Rules (*k*). An answer, which does not exceed *ten folios* in length, may be written merely, but if it exceed that length, unless otherwise ordered, it must be printed (*l*) in the manner provided for the printing of all proceedings in the Supreme Court (*m*), which is the same as that hitherto employed in the Court of Chancery (*n*). In the Court of Chancery the order as to printing (*o*) was considered imperative (*p*), so that a plaintiff could not waive the filing of a printed answer (*q*), but an answer written or printed upon other than the prescribed paper might be filed upon leave being obtained for that purpose (*r*). *Schedules*, which must either be physically annexed to or incorporated (*rr*) by reference in the answer, are part of the answer, and must, therefore, be included in the computation of folios (and written or printed on paper of the same nature as the answer itself (*s*)), but *exhibits* are not (*t*). In a case where the schedules were very lengthy, the printing of the answer was, for that reason, dispensed with, under the power of the Court to "otherwise order" (*u*). In the Court of Chancery it was

Schedules are
included in
answer.

(*g*) Dan. 164, 635 *seq.*; see Ord. XVI. r. 8.

(*h*) See *Hope v. Carnegie* (No. 2), L. R. 7 Eq. 263; Dan. 163 *seq.*

(*i*) *Martin v. Brazner*, 3 Eq. R. 680; see *Pearse v. Dobinson*, L. R. 1 Ch. App. 1; *Trench v. Semple*, W. N. 1866, 102.

(*k*) Ord. XXXI. r. 6; Jud. Act. 1875, App. B. Form 8; v. App. p. 190.

(*l*) Ord. XXXI. r. 7 (as amended by Rs. S. C. June, 1876, r. 11). It seems that every figure counts as one word (see Ord. XIX. r. 5, and *Anon.*, 9 Ha. App. lxxxiii.). See, as to the practice in Chancery as to filing written answers, order March 6, 1860, rr. 2—3, and as to making written alterations in printed answers, *Lee v. Dawson*, 2 L. T. 230; 6 Jur. N. S. 389.

(*m*) Ord. LVI. r. 2. See, as to furnishing copies of answers, Rs. S. C. (costs), Ord. V. rs. 3 *seq.* See, as to *erasures*, *blottings*, *interlineation* and similar defects in answers and affidavits, Rs. April, 1880, r. 15, and Consol. Ord. I. r. 36.

(*n*) Dan. 659, 322.

(*o*) Ord. I., March 6, 1860.

(*p*) See *Harvey v. Bradley*, 31 L. J. Ch. 775.

(*q*) *Blozsome v. Chichester*, 2 De G. J. & S. 444.

(*r*) *Ib.*

(*rr*) *Boldero v. Saunders*, 3 N. R. 59.

(*s*) *Wheale v. Griffiths*, 10 W. R. 57.

(*t*) *Webb v. Bomford*, 46 L. J. Ch. 288.

(*u*) *Webb v. Bomford*, 46 L. J. Ch. 288.

not the practice to print *schedules of accounts or documents* attached to an answer, as office copies might be made of them (*x*). Books or other documents referred to in the answer or made exhibits must be deposited in Court (*xx*). It seems that answers will be allowed to be filed without printing, where only a few copies are likely to be required (*y*), but the poverty of the party required to answer has been held to be no ground for dispensing with the printing (*z*). Answers must be intituled in the action in which they are made, in the same way as pleadings are, and should be so intituled, that, in case of a prosecution for perjury, there would be no difficulty raised as to what interrogatories, in what action, and of whom it was intended to be the answer (*a*). They must be *filed*, in the central office, or in a district registry if the action is proceeding there (*b*), and not merely sworn (*c*); within ten days from delivering of the interrogatories, or such other time as may be allowed for the purpose (*d*). Where a married woman obtains an order to answer separately from her husband (*e*), the time for answering runs from the date of the order, and not from the time of delivering the interrogatories (*f*). Where the party required to answer is out of the jurisdiction, a reasonable time must be allowed him for doing so (*g*), which may be fixed by the order giving leave to deliver the interrogatories out of the jurisdiction (*h*). In the Court of Chancery, as a general rule, four times the time which it would ordinarily take to reach the place where the party was residing out of the jurisdiction was allowed for answer-

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Title.

Time for
answering.

(*x*) See Order 6th March, 1860, r. 2; Dan. 680; *A.-G. v. Edmunds*, 15 L. T. 343; *Wright v. Wilkin*, 32 L. J. Ch. 227.

(*xx*) *A.-G. v. Edmunds*; *Lafone v. Falk. Isl. Co.*, 3 K. & J. 267.

(*y*) *Anon.*, W. N. 1875, 218.

(*z*) *Meux v. Watkins*, 7 Jur. N. S. 704.

(*a*) Dan. 634; see *Rabbeth v. Squire*, 10 Ha. iii.; *Harford v. Rees*, 9 ib. lxviii.

(*b*) Ord. XIX. r. 29.

(*c*) See *Carter v. Stubbs*, C. A. 6 Q. B. D. 116; cf. Cons. Ord. VIII. r. 5.

(*d*) Ord. XXXI. r. 6. Under this rule the time for answering may be shortened as well as extended (see *Ramsden v. Brearley*, 33 L. T. 322). Appeals are not encouraged (*Peru v. Ruza*, 30 L. T. 190).

(*e*) *V. ante*, (*g*).

(*f*) Dan. 166, 642.

(*g*) *The Emma*, 24 W. R. 587; *E. & W. Ind. Dock Co. v. Littledale*, 7 Ha. 57.

(*h*) See *Young v. Brassey*, 1 Ch. D. 277; Dan. 377; cf. Chan. Cons. Ord. X. r. 7, Arts. 1-2.

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ing (i); three months from service of the interrogatories has been considered sufficient in the case of a party residing in the United States (k).

Filing.

The party by whom, or on whose behalf the answer is filed must leave a copy with the proper officer (which must be printed where the original is required to be so) (l), who will examine and mark it as an office copy (m), and notice of the filing must be given to the opposite party on the same day (n). The fact of the filing may be proved by the registrar's certificate, or by an office copy (o).

**Enlargement
of time for
answering.**

Applications for further time to answer are made by summons at Chambers (p). It was not the practice of the Court of Chancery to require an affidavit when the application was made for the first time, the statement of counsel as to the necessity for further time being accepted as sufficient (q), though there was a discretion as to requiring one, and the applicant was required to show "due diligence" on his part and "sufficient cause" for the extension (r), that is, not only that the extended time he asked was necessary *at the time he made his application*, but that he could not (using due diligence from the beginning) have avoided the necessity of making it (s). Where the facts were not disputed there was no occasion for an affidavit to that effect, but the mere silence of the opposite party was not considered equivalent to "sufficient cause" being shown by the applicant (t). There is less necessity now for indulgence in granting extensions of time, as an answer is no longer a statement of the party's defence, a consideration which was not unimportant in estimating the time to be allowed for putting it in (u). Where a party obtains further time for answering, it is on the understanding that a *bond fide* answer will be put in, and not a mere profession of inability to answer (x).

(i) See Dan. 377 (m).

(k) *Rivers v. M'Donald*, Ir. R. 5 Eq. 592.

(l) Rs. S. C. (Costs) Ord. V. r. 6; see Dan. 657, *seq.*

(m) See, as to using office copies in evidence, *post*, p. 103 (l).

(n) Chan. Consol. Ord. III. r. 9.

(o) *Bell v. B.*, 14 Jur. 1129; *Jones v. J.*, 3 W. R. 638.

(p) They need not be drawn up (Rs. S. C. May, 1883, r. 10).

(q) For a form of application, see Appendix, p. 198.

(r) Ch. Cons. Ord. XXXVII. r. 8; Dan. 642.

(s) See *per* Wigram, V.-C., 7 Ha. 65.

(t) *Brown v. Lee*, 11 Beav. 162.

(u) See *York, &c. Ry. Co. v. Hudson*, 13 Beav. 69.

(x) *Financial Corporation v. Bristol, &c. Ry. Co.*, L. R. 3 Eq. 422; see *Lynch v. Leceane*, 1 Ha. 620.

The costs of applications for an extension of the time for answering are in the discretion of the taxing-master, unless dealt with by the order made on the application (y). The costs of an answer containing *unnecessary matter*, or of *unnecessary length*, may be disallowed on taxation, and in such case the party answering must pay the costs occasioned to the other parties by such unnecessary matter or length (z).

CHAP. VI.
Sect. 1.

Costs.

Amending answer.

A party will, in some cases, be allowed to amend his answer to interrogatories; thus, where he has been required by interrogatories to disclose the facts on which he intends to rely in support of his case, in the same way as he might have been compelled to by particulars (a), if he should subsequently to filing his answer discover that there are other facts on which he may fairly and reasonably rely, he will be allowed to amend it in this respect, just as he might have amended his particulars, and set up those other facts (b); or, instead of amending or adding to his answer, he may, according to the modern practice in the Court of Chancery, file a *supplemental answer* (c). Again, if a party, by his answer, states or admits as a fact that which turns out not to be a fact, and has done so by *mistake*, upon an application being made, the Court, when satisfied that it is a mistake, will not hold him bound, so far as he may be relieved by the filing of a supplemental answer (d). But in order to justify the Court in granting such an application, it is requisite, not only that it should be thoroughly satisfied that the admission of fact was a mistake at the time, but that it should have it proved to its satisfaction how the fact now is, and that the arrival at the truth has arisen from the discovery of some document not known to the

Amending
answer.

Supplemental
answer.

When allowed.

(y) Rs. April, 1880, 65. In the Court of Chancery, as a general rule, the costs of a first application were costs in the cause; *cf.* r. 22 of Rs. S. C. (Costs) 1875, annulled by the above rule.

(z) Rs. S. C., 1875 (Costs), Ord. VI. r. 18.

(a) *V. ante*, p. 36. See as to explaining away inadvertent admissions, *post*, p. 131.

(b) *Per* Thesiger, L. J., 7 Ch. D. 452; *per* Cockburn, C. J., 4 Q. B. D. 207. See, as to amending answers generally, Dan. 679 *seq.*

(c) See *per* Kindersley, V.-C., in *Churton v. Frewen*, 35 L. J. Ch. 97, 98.

(d) See *per* Kindersley, V.-C., *ubi supra*; (*s.c.*) L. R. 1 Eq. 238.

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Sect. 1.

Affidavit.

parties at the time (e). Such an amendment will not be allowed, however, where the object is to avoid a threatened prosecution for perjury upon the statements contained in the original answer (f). The application should be supported by an affidavit, showing that at the time of putting in the answer the party did not know the circumstances on which he makes the application, or any other circumstances upon which he ought to have stated the fact otherwise (g); a statement in general terms of the fact of the mistake having been made, is not sufficient (h). Where it is merely desired to amend *errors* in the answer, the proper course is to apply to have it taken off the file that it may be amended and resworn.

SECT. 2.—Particular grounds of objection to answer.

Sect. 2.
Other grounds
of objection to
answer.

After enumerating certain specified grounds for objecting to answer interrogatories (which have already been considered in detail) (hh), rule 5 of Order XXXI. goes on to provide that objection may be made to answer, "on any other grounds," i.e., on any grounds *ejusdem generis* with those already enumerated (i), which according to law entitle the party not to answer (k) (for the Judicature Acts do not give any right to decline answering interrogatories which did not exist before (l), although they enable a party to protect himself from answering in a way in which he could not have done formerly) (m), and, it has been said, appear on the face of the pleadings (n).

The following have been held to be grounds for declining to enforce an answer, or disallowing the interrogatory, according to the practice of the respective Courts in which the question has arisen.

That question 1. That the matters inquired into are matters of *opinion*,

(e) *Ib.*

(f) See *Phelps v. Prothero*, 2 Dr. & Sm. 274.

(g) *Per* Lord Eldon, L. C., 10 Ves. 401; see Dan. 681.

(h) *Churton v. Frewen*, 35 L. J. Ch. 97, L. R. 1 Eq. 238.

(hh) See Chap. IV.

(i) See *per* Jessel, M. R., 8 Ch. D. 652; *per Cur.*, *Eade v. Jacobs*, 47 L. J. Ex. 74, 76.

(k) See *per* James, L. J., 3 Q. B. D. 658.

(l) *A.-G. v. Gaskill*, C. A., 20 Ch. D. 519.

(m) *Per* Cotton, L. J., *ib.* 528.

(n) *Per* Denman, J., 35 L. T. 850. See *Forms, post*, p. 190.

or of law, not of fact, and, therefore, not such as the party interrogated can fairly be required to admit or deny (*nn*); thus, in an action against a professional man for negligence, interrogatories asking *what steps it was his duty to take under the instructions given to him* were disallowed (*o*), but to ask whether a certain way has not always been used as a public footpath, is not asking a question of law (*p*). In determining whether a question is one of fact, and, therefore, to be answered, it makes no difference that it is so stated as to refer to the subject-matter of a written document (*q*).

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Sect. 2.
is as to matter
of law.

2. Interrogatories seeking to contradict a written document by showing that the intention of the parties to it was other than that expressed in it, were disallowed in the common law courts as violating the rules of evidence (*r*), but it is obvious that they would be admissible, in support of a claim for the reformation of the contract properly raised on the pleadings. In the common law courts, a party could not be compelled to *set out the contents* of a document in answer to interrogatories, unless the non-production of the original was *prima facie* accounted for, so as to let in secondary evidence thereof (*s*), and the question arose in a recent case (*t*), whether the Judicature Acts had altered the practice in this respect. The Court (Grove and Bowen, JJ.), affirming the decision of Lindley, J., at chambers, held that they had not, and that the defendant could not be compelled to answer further, and Bowen, J., said (*u*), "I desire to say nothing against the useful practice of simplifying proof by obtaining admissions through interrogatories, even as to written documents (*x*). But down to the passing of the Judicature Acts the rule at common law certainly was that, *where a person was asked on interrogatories to verify the contents of an existing document not in his possession, a demand to see the document before he answered was always*

Rule as to interrogating as to contents of documents.

Dalrymple v. Leslie.

(*nn*) W. pl. 187; Dan. 625.

(*o*) *Whately v. Crawford*, 25 L. J. Q. B. 163; see *Phillips v. Barron*, W. N. 1876, 54.

(*p*) See *A.-G. v. Gaskill*, 20 Ch. D. 519.

(*q*) *Hoffmann v. Postill*, L. R. 4 Ch. App. 673.

(*r*) *Moor v. Roberts*, 2 C. B. N. S. 671.

(*s*) *Herschfield v. Clarke*, 11 Ex. 712; *Wolverhampton Water Co. v. Hawksford*, 5 C. B. N. S. 703; *Scott v. Zygomala*, 4 E. & B. 482; see *Fitzgibbon v. Greer*, Ir. Rep. 9 C. L. 294.

(*t*) *Dalrymple v. Leslie*, 8 Q. B. D. 5 (application for further answer as to contents of alleged libel).

(*u*) *Ib.* p. 8.

(*x*) Dan. 305—6. See Forms, *post*, pp. 189 *seq.*

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Sect. 2.

Opportunity
of inspection
should be
given.

Unfair,
vexatious or
oppressive
questions.

No objection
that informa-
tion can be
obtained
aliunde.

allowed. I do not think the Judicature Acts have altered this rule, nor do I think that any law or authority exists by which a person can be compelled to set out his imperfect recollection of a document not produced for his inspection, which is not suggested to be lost or beyond the jurisdiction of the Court, or which, for anything that appears to the contrary, might even be in the possession of the interrogating party" (y).

An answer will not be enforced to questions which, though in strictness such as the party is entitled to ask, are not such as to conduce to the furtherance of justice or the promotion of truth, or are *unfair, unjust, vexatious, or oppressive* (z). There is nothing unfair, however, in interrogating a party as to his conversations with a person who will probably be called by the party interrogating as his witness (a), as he has a right to get from his opponent his version, to the best of his recollection, of the conversation (b).

It is no ground for declining to answer interrogatories that the interrogator knows as much about the matters inquired into as the party interrogated, or that the same information could be obtained *aliunde*, (for it is one of the very objects of discovery to facilitate proof) (c), *e.g.*, by cross-examining the party interrogated at the trial, the functions of discovery and the functions of cross-examination being totally different (d), or that they seek admission or denial upon oath of the whole matters in question between the parties (e). It is an abuse, however, of the process of the Court, to interrogate the opposite party straight through all the statements in the claim, as was a common practice in the Court of Chancery, whether it is desirable or reasonable or not that discovery should be obtained on the matters contained in those statements (f), or to require a party to admit on oath that which he has already admitted by his pleading (g).

(y) See *per* Whiteside, C. J., Ir. Rep. 9 C. L. 298; *per* Lord Langdale, M. R., 4 Beav. 237. Inspection should be offered by the interrogatory (*post*, p. 189).

(z) See *per* Berrt, J., L. R. 10 C. P. 236; *Dalrymple v. Leslie*, 8 Q. B. D. 5; *Eade v. Jacobs*, C. A., 5 Ex. D. 335; *A.-G. v. Gaskill*, C. A. 20 Ch. D. 519.

(a) See *A.-G. v. Gaskill*, C. A., 20 Ch. D. 519.

(b) See *per* Jessel, M. R., 20 Ch. D. 527; *per* Cotton, L. J., *ib.* 529.

(c) *V. ante*, p. 2. *A.-G. v. Gaskill*, C. A., 20 Ch. D. 519; *Lyell v. Kennedy* (H. L.), 52 L. J. Ch. 385.

(d) See *per* Lindley, L. J., *ib.* 530.

(e) *A.-G. v. Gaskill*.

(f) *Per* Jessel, M. R., *ib.* 526; *per* Cotton, L. J., *ib.* 528.

(g) *Per* Lindley, J., *ib.* 530.

It is no ground for refusing to give discovery that the party seeking it is *in contempt*, if he appears to really stand in need of it for the purposes of the action (*h*), or that he has no right to the relief claimed by him (*i*), or that somebody else, not before the Court, is *interested* in the matters inquired into, and objects to or would be prejudiced by the disclosure, for in discovery, the only question is, whether, as between the party interrogating and the party interrogated, the former is entitled to an answer to the question which he asks; if he is, the latter is bound to answer it satisfactorily, or, at least, to show that he has done so as far as his means of information will permit (*k*).

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Sect. 2.

Or that party
interrogating
is in contempt,
or that third
person would
be prejudiced.

Interrogatories as to the possession of *documents generally* were allowed before the passing of the Judicature Acts both in the Court of Chancery and the Common Law Courts, though in the former Court the party interrogated might decline to answer it, and offer to make an affidavit of documents instead (*l*). Such an interrogatory need not be answered under the present practice, the proper mode of obtaining discovery of documents being that pointed out by Order XXXI. r. 12 (*m*), but a party may be interrogated as to the possession of *particular* documents, and this is the proper course to take when there is reason to suspect that he has other documents than those admitted by him in his affidavit of documents (*n*), or that the nature and effect of documents claimed to be privileged has been misconceived or mis-stated by him (*o*).

Interrogatories
as to the
possession of
documents.

Of the objection that the interrogatories are scandalous.

In addition to the above grounds of objection, there is a Scandal, further one which may arise in the case of interrogatories, viz., that they are *scandalous*. Scandal consists in the

(*h*) *V. post*, pp. 96, 106, 127, 152.

(*i*) *Lush*, Pr. 858; see *per* Wigram, V.-C., 1 Ha. 189.

(*k*) See *per* Lord Cottenham, L. C., Cr. & Ph. 111-2.

(*l*) Dan. 1675; *Piffard v. Beeby*, L. R. 1 Eq. 623; *v. post*, p. 191.

(*m*) *Pitten v. Chatterburg*, W. N. 1875, 248; *Carter v. Leeds, &c. Co.*, *ib.* 1876, 11; *Barnicot v. Harris*, *ib.* 9.

(*n*) *Jones v. Monte Video Gas Co.*, C. A., 5 Q. B. D. 556; the interrogatories may in such a case be general, *i.e.*, as to what relevant documents he has in his possession (*ib.*), or as to the possession of particular documents, and also as to what other documents he has ever had (*Lethbridge v. Cronk*, 44 L. J. C. P. 381).

(*o*) *Call v. Tourle*, 22 L. T. 775.

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Abstract

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that which is called for by the bill, or would be material with reference to the order or decree which may be made at the hearing of the cause (c). To re-answer in a further answer interrogatories already fully answered is impertinence (d).

CHAP. VI.
Sect. 8.

According to the practice of the former Court of Chancery a highly technical degree of fullness and sufficiency was required in answering (e), though in modern times the old practice of requiring a categorical answer to every interrogatory was so far departed from as to allow a party to avoid answering a particular interrogatory where it would be entirely useless, and would entail mere trouble and expense (f), and where interrogatories were oppressively minute, it was enough if they were fairly and substantially, though not technically, answered (g). Under the new practice, the Court is not directed to deal with answers as on exceptions taken in the Court of Chancery, but will look at the question, the answer, and the surrounding circumstances, and consider if anything *important* has been omitted from the answer (h). In a recent case (i) Cotton, L. J., said, "Whatever the old practice in Chancery may have been, I think that if a question has been *substantially* answered, a further answer ought not to be compelled" (k), and Brett, L. J., expressed an opinion that the former practice was not binding with respect to answers (l). It is still, however, a question *not of discretion but of right*. As a matter of right is the interrogator entitled to the information he seeks, or is his opponent entitled to refuse to give it (m)?

Substantial
answer is
sufficient.

Answers should follow the order of the interrogatories, and either answer by traverse or admission, or object to

Answers
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and distinct.

(c) *Per* Wigram, V.-C., 2 Ha. 92; see *Wagstaff v. Bryan*, 1 Russ. & Myl. 28.

(d) *Robinson v. Anderson*, 2 Eq. Rep. 89; *Alfrey v. A.*, 14 Beav. 235; see 15 & 16 Vict. c. 86, s. 17.

(e) See Mitf. [309]; Dan. 630, and cases there cited; *Earp v. Lloyd*, (No 2) 4 K. & J. 58, 60, *per* Wood, V.-C.; *Tipping v. Clarke*, 2 Ha. 393; *Boldero v. Saunders*, 3 N. R. 59.

(f) See *per* Wickens, V.-C., 21 W. R. 138.

(g) See *Reade v. Woodroffe*, 24 Beav. 421; *Lockett v. L.*, L. R. 4 Ch. App. 336; *White v. Barker*, 5 De G. & Sm. 746.

(h) *Imp. Merc. Ass. v. Earl of Huntingdon*, Ir. R. 6 C. L. 545.

(i) *Parker v. Wells*, C. A., 18 Ch. D. 477, 487; see *per* Baggallay, L. J., 52 L. J. Ch. 15.

(k) *Ib.* 487. See *per* Lindley, J., 36 L. T. 472.

(l) *Ib.* p. 485. See also *per* Grove, J., in *Dalrymple v. Leslie*, 8 Q. B. D. 5, 7; *per* Baggallay, L. J., *ubi supra*.

(m) See *per* Bowen, J., 8 Q. B. D. 7.

CHAP. VI.
Sect. 2.

Definition of
scandal.
Nothing
relevant is
scandalous.

allegation of anything which it is unbecoming the dignity of the Court to hear, or is *contra bonos mores*, or which involves an *unnecessary* (*i.e.*, irrelevant) charge of crime or a moral offence (*p*). Nothing, however, is scandalous which is relevant (*q*). No imputation whatever is too bad to be accepted by the Court and allowed to remain on its files, if it be relevant (*r*). There are two ways of raising this objection, viz., (1) by applying to strike out the obnoxious question, and (2) by objecting to answer it (*s*); the former is that usually adopted.

SECT. 3.—Of the sufficiency of answers.

Sect. 3.

Scandal.

Impertinence
or prolixity.

Answers might formerly have been excepted to, and can now be called in question upon a summons for a further answer (the process of exceptions having been abolished) (*t*), for *scandal*, *impertinence*, or *general insufficiency* (*u*); an answer containing scandalous matter may also, as formerly, be ordered to be taken off the file, or to be purged of the objectionable matter, upon application being made to that effect (*x*). Impertinence, in the sense of prolixity or the statement at unnecessary length of necessary facts, was and still is, matter for costs only (*a*), but impertinence in matter, *i.e.*, the statement of facts unnecessary to be stated, tends to embarrass (*b*). Nothing ought to be in the answer except

(*p*) See Dan. 290; *Coyle v. Cuming*, 40 L. T. 455; *Duncan v. Vereker*, W. N. 1876, 64 (objectional details struck out of pleading); *Cashin v. Craddock* (No. 2), 3 Ch. D. 376.

(*q*) *Ib.*; *Blake v. Albion Life Ass. Co.*, 45 L. J. C. P. 663; *Christie v. Christie*, L. R. 8 Ch. App. 499; *Fisher v. Owen*, C. A., 8 Ch. D. 645; *Allhusen v. Labouchere*, C. A., 3 Q. B. D. 654.

(*r*) *Per Wickens, V.-C.*, 26 L. T. 766.

(*s*) Ord. XXXI. r. 5. This was so under the repealed rules 5 and 8, for which the above rule is substituted (see *Fisher v. Owen*, *supra*).

(*t*) Ord. XXXI., rr. 9, 10.

(*u*) Dan. 661 *seq.*

(*x*) See Dan. 292; Consol. Ord. XVI. r. 21. This may be done at the instance of a stranger to the proceedings, as well as of a party, or by the Judge, *suo motu* (*per Fry, J., Cracknall v. Janson*, 11 Ch. D. 1). Costs are allowed as between solicitor and client (*Christie v. C.*, L. R. 8 Ch. App. 499); *Pearse v. P.*, 29 L. T. 453). See a form of summons, *post*, p. 199.

(*a*) See 15 & 16 Vict. c. 86, s. 17; Cons. Ord. XL. rr. 9—10; *Owens v. Emmens*, W. N. 1875, 210, 234.

(*b*) See *per Baggallay, L. J.*, in *Davy v. Garrett*, C. A., 7 Ch. D. 473, 486; *per Thesiger, L. J.*, *ib.* 488; *Furber v. King* (No. 2), 29 W. R. 536; *v. post*, p. 90.

that which is called for by the bill, or would be material with reference to the order or decree which may be made at the hearing of the cause (c). To re-answer in a further answer interrogatories already fully answered is impertinence (d).

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Sect. 3.

According to the practice of the former Court of Chancery a highly technical degree of fullness and sufficiency was required in answering (e), though in modern times the old practice of requiring a categorical answer to every interrogatory was so far departed from as to allow a party to avoid answering a particular interrogatory where it would be entirely useless, and would entail mere trouble and expense (f), and where interrogatories were oppressively minute, it was enough if they were fairly and substantially, though not technically, answered (g). Under the new practice, the Court is not directed to deal with answers as on exceptions taken in the Court of Chancery, but will look at the question, the answer, and the surrounding circumstances, and consider if anything *important* has been omitted from the answer (h). In a recent case (i) Cotton, L. J., said, "Whatever the old practice in Chancery may have been, I think that if a question has been *substantially* answered, a further answer ought not to be compelled" (k), and Brett, L. J., expressed an opinion that the former practice was not binding with respect to answers (l). It is still, however, a question *not of discretion but of right*. As a matter of right is the interrogator entitled to the information he seeks, or is his opponent entitled to refuse to give it (m)?

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(h) *Imp. Merc. Ass. v. Earl of Huntingdon*, Ir. R. 6 C. L. 545.

(i) *Parker v. Wells*, C. A., 18 Ch. D. 477, 487; see *per* Baggage, L. J., 52 L. J. Ch. 15.

(k) *Ib.* 487. See *per* Lindley, J., 36 L. T. 472.

(l) *Ib.* p. 485. See also *per* Grove, J., in *Dalrymple v. Leslie*, 8 Q. B. D. 5, 7; *per* Baggage, L. J., *ubi supra*.

(m) See *per* Bowen, J., 8 Q. B. D. 7.

CHAP. VI.
Sect. 3.

answer, to each interrogatory specifically (*n*), in the latter case alleging matter which may enable the Court to judge whether the excuse, made for not answering the particular question, is sufficient or not (*o*). The party interrogating is entitled to a clear and distinct answer, and to one given in such a way as not to embarrass him in the conduct of his action (*p*), and need not be satisfied with a statement which only by *implication* contains an answer (*pp*).

Evasive or
indirect answer
objectionable.

Danger of
answering
"except as
aforesaid."

The test of the sufficiency of an answer is said to be, whether it would be possible to define the issue for a jury if an assignment of perjury were laid upon it; if it is so complicated and confused that it would be impossible to do so, it is insufficient (*q*). The party interrogated should not answer evasively, but answer the point of substance, and give a fair and substantial answer (*r*); thus, where he is asked as to several things, he should not answer conjunctively by saying that he is unable to answer them, without adding, "or any of them" (*s*), and a mere general denial in answer to a specific charge *may* be evasive (*t*). By simply answering in the terms of the interrogatories, all difficulty on the subject is avoided, but if, instead of doing so, the party gives an answer which is not precise with reference to all the matters on which he is interrogated, and then endeavours to shelter himself under a general denial, coupled with the words, "except as aforesaid," or similar expressions, he makes it often difficult to decide whether the answer is sufficient or not (*u*). The rule of the Court of Chancery was, that whenever the defendant denied the bill to be true, "except as aforesaid," or "except as appears by the other part of the answer," if there were not found on the answer a clear and sufficient statement, which, to a reasonable extent, met the whole case, the answer was deemed to be evasive (*x*). In considering the sufficiency of an answer, the relevancy or materiality of the question to which it professes to be an answer is a matter proper to be

(*n*) Lush. Pr. 858, citing *Chester v. Wortley*, 18 C. B. 239; *per* Wood, V.C., 14 W. R. 579; Dan. 629 *seq.*

(*o*) See *per* Wigram, V.-C., 1 Ha. 190.

(*p*) *Per* Bacon, V.-C., *Furber v. King*, 29 W. R. 536.

(*pp*) *Boldero v. Saunders*, 3 N. R. 59.

(*q*) *Walker v. Daniell*, 30 L. T. 357.

(*r*) See Ord. XIX. r. 22 (pleadings) and Cons. Ord. XV. r. 2.

(*s*) See *per* Wigram, V.-C., in *Tipping v. Clarke*, 2 Ha. 383, 390.

(*t*) *Ib.*; *Earp v. Lloyd*, 4 K. & J. 58.

(*u*) See *per* Wigram, V.-C., in *Tipping v. Clarke*, 2 Ha. 383, 388.

(*x*) See *per* Wigram, V.-C., *ib.*; *Earp v. Lloyd*, 4 K. & J. 58.

taken into account (y), but unless the question is *clearly immaterial*, and *not merely of doubtful materiality*, it is entitled to an answer (z). Upon objections to an answer for insufficiency, the question is whether it was sufficient *at the time it was filed* (a). Therefore, a *subsequent* waiver by the client of his privilege of silence, does not render insufficient the objection of the solicitor to answer upon that ground (b).

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Sect. 3.

Any objection to answering, upon which it is intended to rely, may now be taken in the answer (c), and a party who is entitled to decline answering a particular interrogatory is not precluded from doing so by the fact that he has not applied to have it struck out (d). Whether an objection should be expressly taken to answering an interrogatory or not, depends upon whether *fresh facts* are relied upon as reasons for not answering, in which case they should be set out, or whether the objection is a *mere matter of argument*, and not a statement of new facts, and the answer as it stands is sufficient, in which case it is not necessary to state the objection (e). Thus, where part of a question is irrelevant, a party may simply omit to answer that part, and is not bound to give a reason for not answering (f), but where a party refuses to answer a *relevant* interrogatory, he must state the reason for his refusal (g). Where an interrogatory is unreasonably wide in its terms or otherwise in part liable to the objection of irrelevancy, it is sufficient if it be answered so far as it is relevant, or reasonable (though it seems that this is not obligatory), leaving the objectionable part unanswered (h). Where an objection is taken, the grounds thereof should be distinctly stated, it not being enough for the party interrogated to state that he is advised and believes that he is not liable to give the discovery sought, and, therefore, objects to answer (i).

Objections to answering.

Whether grounds should be stated or not.

Irrelevant questions may be passed over.

(y) See Chanc. Cons. Ord. XVI. r. 4; *Tipping v. Clarke*, 2 Ha. 383.

(z) *Ib.*; *V. ante*, p. 23.

(a) See *Chant v. Brown*, 7 Ha. 79.

(b) *Ib.*

(c) Ord. XXXI. r. 5. See *per Lindley, J.*, W. N. 1876, 12.

(d) See *Fisher v. Owen*, C.A., 8 Ch. D. 645, 649.

(e) See *per Lindley, J.*, in *Smith v. Berg*, 36 L. T. 471, 472.

(f) *Smith v. Berg*; *Church v. Perry*, 36 L. T. 513. The rule in Chancery was that if a party answered at all, he must answer fully (see *per Baggallay, L. J.*, 52 L. J. Ch. 15).

(g) *Gray v. Bateman*, 21 W. R. 137.

(h) See *Parker v. Wells*, C. A., 18 Ch. D. 477, *per Jessel, M. R.* and Brett, L. J.; *contra*, Cotton, L. J., and see *Gray v. Bateman, supra*.

(i) *Anon.*, W. N. 1875, 229. See Forms, *post*, p. 193.

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Party must answer as to his knowledge, information, and belief.

Excess of superfluous matter.

Generally speaking, the party answering must answer as to his *knowledge, information, and belief* (*k*), a mere profession of inability to answer being considered insufficient and evasive (*l*); but it is not necessary that those precise words should be used, if the expressions actually used are tantamount to them (*m*). Ordinarily speaking, an answer on *knowledge and belief* includes knowledge or *information*, but the latter expression should not be omitted where the party's only knowledge must naturally have been acquired from others (*n*). It is sufficient, as to a fact of which it is impossible, or highly improbable that the deponent can have personal knowledge, to answer as to *belief* only (*o*), and in such a case the words, "I am informed," are the same as "I believe" (*p*). If the deponent has no information or belief concerning the matters upon which he is interrogated, he must say so, and that will be a sufficient answer (*q*) (and "I cannot answer more particularly than I have done," or a statement to that effect, is a good answer) (*r*), but when the matters inquired into are the party's own recent acts, and must therefore presumably be within his knowledge and recollection, he will not be allowed to say that he has no recollection as to them, and even no belief on the subject (*s*). An answer may be insufficient, although it categorically answers the interrogatories, by reason of its containing in addition an excess of irrelevant or impertinent matter (*t*), especially where unfairly inserted with the object of preventing the party obtaining the answers from putting them in evidence at the trial (*u*), and whether the amount of irrelevant matter is so *excessive* as to make an answer insufficient, is a question for the discretion

(*k*) Dan. 627; Kerr, 207 *seq.*; *The Minnehaha*, L. R. 3 A. & E. 148; *Reynolds v. Bloomfield*, 10 Ir. Rep. C. L. xiv.

(*l*) *The Minnehaha*; see *Financial Corporation v. Bristol, &c., Ry. Co.*, L. R. 3 Eq. 422.

(*m*) *V. supra*. A party cannot be asked as to his belief, when founded solely on privileged information. (See *Kennedy v. Lyell*, 48 L. T. 456, Jessel, M. R. and Lindley, L. J.)

(*n*) See *A.-G. v. Rees*, 12 Beav. 50; *post*, p. 91.

(*o*) *Stuart v. Bute*, 11 Sim. 442, 444.

(*p*) See *Woodhatch v. Freeland*, 11 W. R. 398.

(*q*) *The Minnehaha*, L. R. 3 Ad. & Eccl. 148; *Anon.*, W. N. 1876, 106; *Amhurst v. King*, 2 S. & S. 183; *Jones v. Wiggins*, 2 Y. & J. 385 (answer professing entire ignorance held under the circumstances sufficient).

(*r*) *Crossley v. Tomey*, 2 Ch. D. 533.

(*s*) *Furber v. King*, 29 W. R. 536; *Newton v. Dimes*, 3 Jur. N. S. 583; see however *per* Lord Langdale, M. R., 4 Beav. 43.

(*t*) *Peyton v. Harting*, L. R. 9 C. P. 9; *s.c.*, 43 L. J. C. P. 10.

(*u*) See *per* Denman, J., *ib.* p. 12.

of the Court or Judge (x). It seems, also, that an answer stating matter of defence as well as answering the question is insufficient (y), though any fair explanation or qualification of the answer may be given, provided it be not done at excessive length (z). CHAP. VI.
Sect. 3.

The question as to the extent to which a party is bound to answer as to the acts of his agents or servants, or persons within his control, or for whose acts, with reference to the matters in question, he is answerable (a), or to procure information for the purpose of answering has been recently discussed by the Court of Appeal (b). Lord Justice Brett said (bb): "The contention on behalf of the defendants is in substance this—that they are in this case not bound to give any further answer, because, in order to do so, they would have to make inquiries of their agents or servants; and it is urged that they are not obliged to make any such inquiries, and that it is sufficient for them to say that they cannot make a better answer because they themselves were not personally present. I am of opinion that a party who is interrogated is not excused from answering questions with regard to certain acts by saying that he was not present when the acts were done, and that his agents were present. If the acts done were such as he must know would, in the ordinary course of business, be done and known to his servants or agents, then, I think, he is bound to answer fully, and give satisfactory information as to those acts. If, indeed, those acts are not more known to his servants or agents than to other persons, then he may not be bound to answer. Also I think that he makes a sufficient answer if he says that, although the acts about which inquiry is made were, if done at all, known to his servants or agents, yet he does not himself know whether they were done or not, and the servants or agents who did them, if they were done, are no longer in his employ or under his control, or are in such a position that it would not be reasonable to force him to enter into any communication with them (c). * * * I

Rule as to
answering as
to acts of
servants or
agents.

Judgment of
Brett, L. J.,
in *Bolckow v.*
Fisher, C. A.

(x) *Per Brett, J.*, *ib.* 11.

(y) See *Anon.*, W. N. 1876, 39; *Furber v. King*, 29 W. R. 536.

(z) *Ib.* See *per Brett, J.*, in *Peyton v. Harting*, 43 L. J. C. P. 10, 12.

(a) See *A.-G. v. Rees*, 12 Beav. 50; *Earl of Glengall v. Frazer*, 2 Ha. 99.

(b) *Bolckow v. Fisher*, 52 L. J. Ch. 12; s.c. 10 Q. B. D. 161; see *A.-G. v. Rees*; *Lord Glengall v. Frazer*; *Neate v. Duke of Marlborough*, 2 Y. & C. 3.

(bb) *Ib.* 16.

(c) See *M'Intosh v. G. W. R.*, 4 De G. & Sm. 502.

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Sect. 3.

Lindley, L. J.

Knowledge of
servant or
agent, is
knowledge of
master or
principal.

am further of opinion that, if it were shown in the answer that it would be wholly unreasonable to ask the party interrogated to make inquiries, that it would be too expensive or too cumbersome, or that unreasonable details were sought for, then it might well be that the answer would be sufficient, even though the question was not answered in every detail."

And Lord Justice Lindley said (*d*): "The question upon the facts of this case is, whether a person who is interrogated as to what was done by his servants or agents, can answer that he does not know, and that he will not inquire. I think that he cannot. Where a party is interrogated as to matter done or omitted to be done by his servants or agents, it is not open to him to make such an answer. Most of the authorities apply to the discovery of documents, but the principle is the same, and the case of *Attorney-General v. Rees* applies that principle to interrogatories. *The knowledge of the servant is in such a case the knowledge of the employer, and the employer is bound to make reasonable efforts to obtain the information required.*" In point of law the principal is to be deemed to have known the facts before he has actually got personal information about them (*e*). But where the party interrogating has at least equal means of obtaining the information, the party answering will not have the burden of doing so imposed upon him (*f*), and it is doubtful whether in any case he is bound to incur expense for the sake of answering (*g*); thus, in a question of pedigree, one party could not compel the other to examine parish registries, accessible to both, for the purpose of answering as to their contents (*h*). A defendant, *with regard to transactions that are not his own*, is not bound to find out information for the purpose of communicating it to the plaintiff (*i*).

(*d*) 52 L. J. Ch. 17.

(*e*) *Per* Mellish, L. J., in *Anderson v. Bank of British Columbia*, C. A., 2 Ch. D. 644, 659; see as to the duty of principals to procure information from their agents, the judgments of the L.L. JJ. in that case, and as to directors answering on behalf of companies, *per* Cotton, L. J., 3 Q. B. D. 321; *Hall v. L. & N. W. Ry.*, 35 L. T. 848.

(*f*) *Earl Glengall v. Fraser*, 2 Ha. 99; *Leahy v. Lord Milton*, 11 L. T. (O. S.) 391.

(*g*) *V. post*, p. 138.

(*h*) See *Per* Wigram, V.-C., 2 Ha. 103—4. One party has no right to impose upon the other the duty of doing accountant's work for him, (*v. post*, p. 93).

(*i*) *Per* Leach, V.-C., 11 Sim. 405.

A party is bound to answer as to the contents of all such documents as are in his possession or power, and all such as he has the right of access to, and inspection of, are in his power, provided he can enforce that right (*k*). In such cases he must either give the information required, or at least show that he has *bond fide* endeavoured to acquire it, and that it is *physically impossible* for him to give it (*l*). A party may be asked to verify the contents of, or admit his signature to documents not in his possession or power, which are produced to him for that purpose, but he will not be compelled to set out his imperfect recollection of a document not produced by his interrogator for his inspection, which is not suggested to be lost or beyond the jurisdiction of the Court, or which for anything that appears to the contrary, might even be in the possession of the interrogating party (*m*). Thus, in an action for libel the defendant will not be compelled to set out from memory the contents of the alleged libel, of which she swears that she has no exact recollection, unless the document is produced to her before answering, or its non-production satisfactorily accounted for, the old practice in this respect at Common Law not having been altered by the Judicature Acts (*n*).

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Answering as
to contents of
documents.

The rule of practice in the Court of Chancery was that, where interrogatories were of a character which would make it *oppressive* to compel the defendant to set out precisely all the particulars called for, the defendant was justified in *answering by reference to books*, if he said that they contained the best information which he was able to give in answer to the interrogatories; in which case the books became part of the answer, so as to entitle the opposite party to inspection (*o*). Thus, where laborious and detailed accounts were asked for, the Court would consider the circumstances of

Answering by
reference to
books, etc.

(*k*) *Taylor v. Rundell*, 1 Y. & C. Ch. 128, 1 Phill. 222, 226, *per* Lord Lyndhurst, L. C.

(*l*) *Stuart v. Lord Bute*, 11 Sim. 442, 451, 12 *ib.* 460; *M'Intosh v. G. W. R.*, 4 De G. & Sm. 502; *Mertens v. Haigh*, 3 De G. J. & S. 528; *per* Lord Cottenham, L. C., 1 Cr. & Ph. 112, 113; *Taylor v. Rundell*, *ubi supra*.

(*m*) *Dalrymple v. Leslie*, 8 Q. B. D. 5; *ante*, p. 83.

(*n*) *Ib.* See *Fitzgibbon v. Greer*, Ir. Rep. 9 C. L., 294, 298, *per* Whiteside, C. J.

(*o*) See *per* Wood, V.-C., in *Drake v. Symes*, Johns. 647, 652; *White v. Barker*, 5 De G. & Sm. 746; *Lockett v. L.*, L. R. 4 Ch. App. 338; *Ambler v. Bolton*, W. N. 1871, 12. The old rule was that the books must be deposited in Court (*v. ante*, p. 79), but see *post*, p. 140.

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Reference
should be
specific.

Answer as to
accounts.

Successive
answers to be
read together.

the case, and see what useful object could be served by compelling such an account, and whether every object would not be answered by an inspection of the documents themselves (*p*). In such case, the books should be referred to with such explanations, and in such a manner, as to make it as convenient as possible for the party seeking the discovery to consult them. It is not enough to say, "Such and such books, without specifying them more distinctly, contain everything you want," or to refer generally to a voluminous correspondence, without specifying any particular letters. It should be pointed out in what books the information is to be found or sought for, so as to narrow as far as possible the sources of information through which he will have to search (*q*). It was also the rule that where the right of the plaintiff to the account sought was denied, but the defendant gave such an admission as was sufficient for all the objects of the suit up to and including the hearing (*i. e.*, sufficient to entitle him to a judgment or order in his favour), he need not give any further details respecting the account (*r*). Under the new practice, the general tendency has been to postpone *detailed* accounts until after the hearing, except in the case of executors and administrators, and to require only aggregate amounts, summaries, or balance-sheets, whether the right is admitted or denied (*s*). Where an account has been already rendered, it would perhaps be sufficient to refer to, and verify it by the answer (*t*).

In the case of a second or third answer or examination, its sufficiency is to be decided by looking, not at the particular answer only, but at it as taken in connection with the preceding answer or answers (*u*), and the *inconsistency* of a further answer with a previous one, or of an examination with an answer, does not constitute insufficiency (*x*). Repeti-

(*p*) See *Lockett v. L.*, L. R. 4 Ch. App. 338. *Secus*, where a short and simple account only was asked for (see *Telford v. Ruskin*, 1 Dr. & Sm. 563).

(*q*) See *per* Wood, V.-C., in *Drake v. Symes*, John. 647, 652; *White v. Barker*, 5 De G. & Sm. 746; *Inglessi v. Spartali*, 29 Beav. 564; *Christian v. Taylor*, 11 Sim. 401.

(*r*) *Lockett v. L.*; *Clegg v. Edmundson*, 22 Beav. 136; *Wier v. Tucker*, 41 L. J. Ch. 471, L. R. 14 Eq. 25; *Saunders v. Jones*, C.A., 7 Ch. D. 435, 446.

(*s*) *V. ante*, pp. 30 *seq.*

(*t*) *Re Sutcliffe*, 44 L. T. 547. But see *Telford v. Ruskin*, *supra*.

(*u*) *Farquharson v. Balfour*, T. & R. 184, 189; *Alfrey v. A.*, 14 Beav. 235.

(*x*) See *Farquharson v. Balfour*, T. & R. 184, 204.

tions in a subsequent answer of statements made in a previous one, are, as we have seen, impertinent (y).

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Sect. 3.

SECT. 4.—*Of enforcing an answer or further answer.*

If the party interrogated omits to answer, or answers insufficiently, the party interrogating may apply for an order requiring him to answer, or answer further, as the case may be (a), and no exceptions need be taken to an answer as insufficient (b), its sufficiency or insufficiency being a matter to be determined by the Court or a Judge (c). In the case of an *irregular, wholly evasive, or illusory answer*, or one containing scandalous matter, the proper course is to apply to have it taken off the file (d), with costs against the party filing it (e), but unless an answer is so palpably insufficient as to show want of *bona fides*, a party should proceed under this rule, instead of applying under r. 20 (f). Where a party dies before answering at all, or after putting in an insufficient answer, and the suit is continued by or against his personal representatives, they may be required to answer or answer further, as the case may be (g). The application should be made by summons at Chambers in the first instance, in all the Divisions, and the summons, if for a further and better answer, should (unless the whole are objected to, or the answer is plainly evasive or an abuse of the process of the Court) (h) specify the particular answers objected to as insufficient, or the particular interrogatories or parts thereof to which a further answer is required (corresponding to the former exceptions), in order to give the opposite party an opportunity, if he

Sect. 4.
Summons for
answer or
further answer.

Statement of
objections
should be given
previously.

(y) *Ante*, p. 87 (d).

(a) Ord. XXXI. r. 10. See as to what answer is sufficient, *ante*, p. 87.

(b) A statement of objections should, however, be given (*v. post*, p. 194).

(c) *I.e.* apparently, on a motion or summons to consider the insufficiency of the answer, as in the Court of Chancery (see *Ashley v. Taylor*, 37 L. T. 522; *Furber v. King*, 29 W. R. 536; *Dickson v. Harrison*, 47 L. J. Ch. 686. The usual method of procedure is under r. 5.

(d) See Dan. 684; *Turner v. Jack*, 19 W. R. 433; *Walker v. Daniels*, 22 *ib.* 595. See Form, *post*, p. 199.

(e) See *Read v. Barton*, 3 K. & J. 166.

(f) *Kennedy v. Lyell*, C.A., W. N. 1882, 137.

(g) *Martin v. Brazner*, 3 Eq. R. 680; *Pearse v. Dobinson*, L. R. 1 Ch. App. 1.

(h) *Furber v. King*, 29 W. R. 536.

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chooses, to submit to the objections out of Court (*i*). If this be not done, there is a discretion to refuse the applicant his costs, even if successful, or the summons may be adjourned to enable the objecting party to furnish his opponent with a written statement of his objections (*k*). On appeal from the Judge at Chambers, objections cannot be taken before the Divisional Court to interrogatories which were not specifically objected to at Chambers (*l*). A party in contempt for non-payment of costs is not thereby precluded from applying for a further answer (*m*).

Time within which application should be made.

Although no time is prescribed by the rules within which the application must be made, it should be made within a reasonable time after the filing of the answer (*n*), which will, it seems, in ordinary cases be estimated by reference to the period allowed to a plaintiff in the Court of Chancery for excepting to an answer as insufficient, *viz.*, six weeks (*o*). In the Common Law Courts, it was considered that it should be made *promptly* (*p*). It may be observed that an answer is deemed to be sufficient until formally objected to (*q*).

Right may be lost.

The right to enforce an answer may be waived, *e.g.*, by the party interrogating signing final judgment against the party interrogated (*r*), or setting down the action for trial or giving notice of motion for judgment; in short, by taking any step in the action equivalent to saying that the party interrogating does not really stand in need of the answer for the purposes of the action (*s*); it is not waived, however, by giving the defaulting party notice to produce documents admitted to be in his possession by the answer (*t*), or by taking a copy of the answer, as the party has a right to

(*i*) *Ashley v. Taylor*, C.A., 38 L. T. 44; *Chesterfield Co. v. Black*, 24 W. R. 783; *Anstey v. N. Woolwich Co.*, 11 Ch. D. 439.

(*k*) *Anstey v. N. Woolwich Co.*, *supra*; see *Langton v. Waite*, 15 L. T. 204. A form of summons will be found in the Appendix (*post*, p. 194), and a form of statement of objections, *b*.

(*l*) *Church v. Perry*, 36 L. T. 513.

(*m*) *Wilson v. Bates*, 3 Myl. & Cr. 197.

(*n*) *Lloyd v. Morley*, 5 L. R. Ir. 74.

(*o*) *Ib.* See Cons. Ord. XVI. r. 6. It must be remembered, however, that an answer in Chancery included the defendant's statement of his defence.

(*p*) *Chester v. Wortley*, 18 C. B. 239.

(*q*) *Lafone v. Falkland Isl. Co.*, 2 K. & J. 276.

(*r*) *Hayne v. Pratt*, L. R. 6 C. P. 105; *Bridgewater v. B.*, XXII. Sol. Journ. 662.

(*s*) *Boyse v. Cokell*, 18 Jur. 770.

(*t*) *Lane v. Paul*, 3 Beav. 66; *Hunter v. Capron*, 5 *ib.* 93.

see if it is sufficient (*u*), though retaining a copy until the time for excepting to the answer had expired was held to have that effect (*x*). CHAP. VI.
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The applicant must show that there has been, *without just cause* (*y*), an omission or refusal to answer. If an interrogatory is unreasonably wide, and the party interrogated declines to answer it at all, which he is entitled to do (*z*), the party interrogating should not press for a full answer, but submit to take a qualified order for an answer to the interrogatory as properly limited, to which he is entitled (*a*). The relevancy or materiality of the question to which it professes to be an answer (*b*), and the likelihood of any benefit to be derived from getting the desired answer (*c*), must be taken into consideration in deciding on the sufficiency or otherwise of an answer. Materiality of question may be considered.

On the hearing of the application an order may be made for a further answer, either by affidavit (as is usually done), or by *vivd voce* examination, as may be directed (*d*). Where a further answer is ordered, a time for putting it in should be specified in the order (*e*), but it is no longer necessary that the copy served upon the opposite party should be endorsed with the memorandum required by Consolidated Order XXIII. r. 10, or any notice of the consequences of disobedience thereto (*f*). An order directing an answer "forthwith" has been held to be a sufficient direction in this respect (*g*). In the Court of Chancery it was not the practice to order an examination until after a *third* answer had been pronounced insufficient, thus showing the party to be contumacious (*h*), when it was a matter of course to order him to be examined personally upon interrogatories Order for further answer.

(*u*) *Herrett v. Reynolds*, 2 Giff. 409.

(*x*) *Ib.*

(*y*) See C. L. P. Act, 1854, s. 53.

(*z*) See *per* Jessel, M. R., and Brett, L. J., in *Parker v. Wells*, C.A., 18 Ch. D. 477, *diss.* Cotton, L. J.

(*a*) *Ib.*

(*b*) See Ch. Cons. Ord. XVI.

(*c*) *Per* Wigram, V.-C., 2 Ha. 388; *Hurst v. Peirse*, 4 Price, 339.

(*d*) Ord. XXXI. r. 10. For form of Summons, *v. post*, p. 195.

(*e*) See Cons. Ord. XVI. r. 14.

(*f*) *Thomas v. Palin*, C.A., 21 Ch. D. 380. The order must be entered (see *Ballard v. Tomlinson*, 48 L. T. 515).

(*g*) *Thomas v. Nokes*, L. R. 6 Eq. 521.

(*h*) Cons. Ord. XVI. r. 19; *Farquharson v. Balfour*, T. & R. 203; *Corp. of Liverpool v. Chippendale*, 19 L. J. Ch. 327; see, however, *Rishton v. Grissel*, 14 W. R. 578, where a *fourth* answer was ordered, and *Hamilton v. Nott*, L. R. 16 Eq. 112, where *eleven* answers in all were filed.

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Sect. 4.

Oral examina-
tion.

Mode of
conducting
examination.

before the Chief Clerk as to the points on which it was held insufficient, and to stand committed until he should have properly answered (*i*), and latterly the practice of directing a *vivâ voce* examination in such cases prevailed (*k*). After an examination had been ordered, a further answer would be taken off the file as irregular (*l*). The present practice is to direct a further and better answer to be filed in the first instance instead of an oral examination, but it is a matter entirely for the discretion of the Court. The oral examination may be conducted before a chief clerk (*m*), master (*mm*), or examiner of the Court (*n*), and will not, as a rule, be taken before a Judge, in the first instance (*nn*). If the party when examined refuses to answer, or answers insufficiently, the examination should be adjourned, and an appointment procured to resume it before the Judge in Chambers, as he has power to commit for not answering, or, an application made to him to commit the party (*o*). The examination may be conducted by means of interrogatories, settled by the examining authority, supplemented by *vivâ voce* questions, where necessary, or, which is the more convenient practice, and that hitherto exclusively prevalent in the Courts of Common Law, by *vivâ voce* question and answer exclusively. The order for an oral examination need not specify the precise interrogatories to which a further answer is required, or the precise points upon which the examination is to take place, but may be in general terms, *viz.*, that the party shall answer as to the matters with respect to which he has refused or omitted to make an affidavit (*p*). In *Peyton v. Harting* (*q*), the examination was conducted by the Master, and is said to have been conducted on similar principles to an examination in Court,

(*i*) Cons. Ord. XVI. r. 19. See *Hayward v. H.*, Kay, App. xxxi.; *Croskey v. European Co.*, 14 W. R. 514, and, as to the practice on such examinations, Dan. 673 *seq.*

(*k*) See *Danell v. Page*, 37 L. J. Ch. 631; *Rishton v. Grissel*, 14 W. R. 578; *Lloyd v. Adams*, 4 K. & J. 467.

(*l*) *Russell v. Dight*, 6 Sim. 430; *Corp. of Liverpool v. Chippendale*, 19 L. J. Ch. 327.

(*m*) See *Hayward v. H.*

(*mm*) See C. I. P. Act, 1854, § 53.

(*n*) See *Danell v. Page*.

(*nn*) *Hayward v. H.*

(*o*) *Id.*

(*p*) *Peyton v. Harting*, L. R. 9 C. P. 9; 43 L. J. 10. See Consol. Ord. XVI. r. 19.

(*q*) See 43 L. J. C. P. 13 n. (2).

counsel being allowed to attend on behalf of both parties, and those questions only which were contained in the written interrogatories being allowed to be asked, except where the answer was not sufficiently precise, when other questions were allowed to obtain an explicit statement (*r*). According to *Farquharson v. Balfour*, the interrogating party has no right to be represented on the examination by counsel, or even to be present himself, any more than if it were the case of an ordinary answer; but in *Danell v. Page*, permission was given to the interrogating party to cross-examine by his counsel the opposite party on his affidavit. Under the Common Law Procedure Act, 1854, the Court or Judge might order the production of any writings or other documents mentioned in the rule or order (*s*), and it was held that the Court had power, under s. 46 of that Act, to order, as ancillary to such application, certain persons to be examined as witnesses touching the matters on which the discovery was sought, the application being postponed in the meanwhile (*t*). The answer taken on such examination must be returned to, and filed in the Central Office (*u*), and the opposite party has a right to see it before the party examined is discharged (*x*). If the party so refers to documents in his examination that, in the case of an answer, they would have been made part of it (*y*), the opposite party has a right to see them also (*z*). Where successive depositions have been taken on an examination they are all regarded as one entire document, and as part of the original answer (*a*); repetitions, therefore, of statements made in the answer or a previous deposition are impertinent (*b*). An examination, like an answer or affidavit of documents, may be sufficient, though it is probably untrue, and inconsistent with what has been sworn by the party in his previous answers, for the Court

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Production of
documents
upon examina-
tion.

Examination
to be filed.

Sufficiency of
examination.

(*r*) See *Farquharson v. Balfour*, T. & R. 203, from which case it appears that any question fairly arising out of the matters contained in the answers may be put.

(*s*) *Ib.* s. 53. These powers may still be resorted to as existing procedure.

(*t*) *Moline v. Tasm. Ry. Co.*, 32 L. T. 128; cf. *Morgan v. Alexander*, L. R. 10 C. P. 184.

(*u*) Reg. Gen. Hil. 1853, r. 33; C. L. P. Act, 1854, s. 55; Ord. XXXVII. r. 15.

(*x*) *Farquharson v. Balfour*, *supra*.

(*y*) *V. ante*, p. 93.

(*z*) *Farquharson v. Balfour*, *ubi supra*, p. 202.

(*a*) *Allfrey v. A.*, 14 Beav. 235; *Robinson v. Anderson*, 2 W. R. 2; *v. ante*, p. 94 (*u*).

(*b*) *Ib.*

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Application
for committal
must be to
judge.

Costs of further
answer or
examination.

must be satisfied with what the party's conscience allows him to swear (c). Where the examination is conducted before a chief clerk, master, or examiner, and the answers are pronounced insufficient, the defaulting party cannot be committed immediately upon default, but a certificate or report of the insufficiency of the examination must be given, which must be dated on the day that the application for the attachment is made (d). As this course entails considerable delay, where there are successive examinations, it is more convenient to have the party examined before a Judge in the first instance, who can commit for any refusal to answer, or to get the master or chief clerk to adjourn the examination, and procure an appointment before the Judge in Chambers (e). If the examination is reported or certified as insufficient, the party who obtained the order for it may apply for the committal of the defaulting party (f); in the Court of Chancery it was not the practice to order a committal until there had been *four* insufficient examinations, by analogy to the ancient practice in the case of insufficient answers, Consol. Ord. XVI. r. 19 being held not to apply to such examinations (g).

The general rule in the Court of Chancery was that the defendant paid the costs of exceptions, where allowed (gg), for which purpose the costs must be expressly asked for at the time (h). If nothing was said about them, they either became costs in the cause (i), or none were given at all (k). In the Court of Chancery, a defendant against whom the order for examination was made had to pay such costs as the Court thought fit to award (l), which were generally those of his insufficient answers and the application, the costs of the examination being reserved (m), but not progressive or exemplary costs, even where there had been accumulated

(c) *Farquharson v. Balfour*, T. & R. 204.

(d) *Hayward v. H.*, Kay, App. xxxi.; cf. C. L. P. Act, 1854, s. 56.

(e) *Ib.*

(f) *V. post*, p. 151, *Consequences of failure to comply with orders for discovery*.

(g) *Alfrey v. A.*, 12 Beav. 620, followed in *Hayward v. H. supra*.

(gg) See *Langton v. Waite*, 15 L. T. 204; *Newton v. Dimes*, 3 Jur. N. S. 563; *Earp v. Lloyd*, 4 K. & J. 56.

(h) *Earp v. Lloyd*; *Betts v. Rimell*, W. N. 1866, 22.

(i) *Crossley v. Stewart*, 8 L. T. 269.

(k) *Langton v. Waite*.

(l) Ch. Cons. Ord. XVI. r. 19.

(m) *Danell v. Page*, 37 L. J. Ch. 631.

omissions to answer (*n*). In the common law courts, the costs of the application and proceedings thereon were in the discretion of the Court or Judge by whom the order was made and were provided for therein (*o*). The present rule, as laid down in a recent case, is that the costs of the *application for a further answer* are to be paid by the applicant or the opposite party according as either is wholly successful; if each is in part successful, they are apportioned accordingly (*p*), or if only a small proportion of the questions are ordered to be answered, they are made costs in the action (*q*). A master has jurisdiction to order prospectively the costs of a further answer or examination to be paid by the party interrogated in any event (*r*), but it has been said that it is better, generally speaking, to reserve any question as to them for the trial, for that otherwise there might be some risk of the examination being unduly protracted (*s*). Where the application is necessitated by the want of care shown by the applicant in framing his questions, he may be deprived of his costs even if successful (*t*), and, as we have seen, an omission to give a proper notice of objections may have the same effect (*u*).

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SECT. 5.—*Using answer in evidence.*

A party may, at the trial of an action or issue, use in evidence any *one or more of the answers* of the opposite party to his interrogatories without putting in the other answers, but in such case the Judge may look at the whole of the answers, and if he is of opinion that any of the others are so connected with those put in that the latter ought not to be used in evidence without them he may direct them to be put

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One or more
answers may be
put in without
the others.

(*n*) *Ib.*

(*o*) C. L. P. Act, 1854, s. 53. The rule seems to be the same under the present practice (see Ord. LV., and *Abud v. Riches*, 2 Ch. D. 528).

(*p*) See *Willis v. Childs*, 13 Beav. 454; *Larkin v. Dennis*, Ir. Rep. 2 Eq. 276.

(*q*) *Re Sutcliffe*, 44 L. T. 547; Dan. 675; *Dally v. Worham*, 32 Beav. 185.

(*r*) *Vicary v. G. N. R.*, 9 Q. B. D. 168; *Mitchell v. Darley Coll. Co.*, 10 *ib.* 457.

(*s*) *Per Denman, J.*, *ib.* 169.

(*t*) *Drake v. Symes*, John. 647; *Simpson v. Charlesworth*, 14 L. T. 699.

(*u*) *V. ante*, pp. 95—6.

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Except where
qualified or ex-
plained by the
others.

in (x). According to the former common law practice, a party could not put one answer in evidence without putting in the rest, while in Chancery the rule was the same as the present one, *viz.*, that a single answer or passage of an answer might be put in by itself unless it was *qualified or explained* by some other passage in the answer, in which case such latter passage must also be read, although not connected in point of grammatical construction with the former passage, but separated from it by passages relating to distinct subjects, providing that it was in substance connected, *i.e.*, in meaning (y). The Court, however, in its discretion, sometimes allowed part of an answer already read to be withdrawn, where the plaintiff had been surprised by being compelled by the rules of the Court to read a further passage of the answer (z). The application to have the other answers read is usually made at the time on behalf of the party against whom the answer has been used. It may be observed that interrogatories are not evidence against the party by whom they are administered (a).

Reading
answer against
party making
it.

No notice need be given to the party interrogated of the intention of the interrogating party to read his answer against him (b), but the answer of one plaintiff or defendant cannot be read as evidence against another plaintiff or defendant without such notice, the answer being in such case read as an *affidavit*, and the party against whom it is so read having the right to cross-examine upon it (c). An *unsworn* answer (where an oath is requisite) cannot be read as evidence on behalf of the party answering (d). A party using in a previous proceeding the answer or deposition of a third person makes it evidence against himself thereafter for all the world, as the using of it is an admission that its contents are true (e); *a multo fortiori*, therefore, the answer of the party himself, used by him in a former action is admissible

Effect of using
answer in
evidence.

(x) See Ord. XXXI. r. 23; *Rickard v. Moore*, 28 L. T. 841, 843.

(y) Dan. 741; *Freeman v. Tatham*, 5 Ha. 329; *Nurse v. Bunn*, 5 Sim. 225; *Reade v. Whitchurch*, 3 ib. 562; *Miller v. Gow*, 1 Y. & Coll. Ch. 59; *Davis v. Spurling*, 1 R. & M. 68.

(z) See *Freeman v. Tatham*.

(a) *Carvell v. Gees*, 15 L. T. N. S. 217.

(b) See *Dawkins v. Mortan*, 1 J. & H. 339; *Stephens v. Heathcote*, 1 Dr. & Sm. 138; *Todd v. Gamble*, Ir. Rep. 4 Eq. 117.

(c) Dan. 742; *Heatley v. Newton*, 51 L. J. Ch. 225.

(d) *Wadeer v. E. I. Co.*, 3 L. T. 646; *Dublin, &c. Ry. Co. v. Navan, &c. Ry. Co.*, Ir. Rep. 5 Eq. 393.

(e) *Richards v. Morgan*, 4 B. & S. 641; 33 L. J. Q. B. 114.

on proof of its having been so used (*f*) without proof of the handwriting, or production of the interrogatories to which it is an answer (*g*), their non-production not rendering it inadmissible in evidence, but being only matter of remark, of more or less force, that the evidence not produced might have altered the nature of the apparent admission, a remark which would, of course, have no effect whatever, where the answers are quite intelligible by themselves (*h*). The party, however, whose answer it is, is entitled to put in the interrogatories, and require them to be read as *explanatory of the admission*, just as, where part of a conversation has been given in evidence, he might on cross-examination, or by independent evidence, prove the rest of the conversation, or where a letter purporting to be part of a correspondence has been given in evidence, might give in evidence the other letters to explain it (*i*).

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Interrogatories
may be read.

The answer may be proved by means of an examined copy (*k*) or an office copy (*l*). A party is not bound by all he reads from an answer, but if, upon the whole of the evidence taken together, the presiding Judge is satisfied that part of the statement read is erroneous or untrue, he may and ought to treat it as such (*m*).

Proof of
answer.

It was the rule in the Court of Chancery that the answer of a person made a party for the purpose of discovery could not be read in evidence against the corporation of which he was an officer (*n*), for there may be a right to discovery from A. as to the acts of B., and yet not a right to use it as evidence against B. (*o*). Under the new practice, the answer as to matters of *fact*, of an officer or member of a corporation, company, or other body, selected to give discovery on their behalf, is evidence against them, as being *their* not his answer, he representing them for the purpose of giving the

Answer of
officer or
member may
be read against
corporation or
company.

(*f*) *Fleet v. Perrin*, L. R. 3 Q. B. 536. *Quære tamen*, how far an answer can be said to be used by merely making and filing it.

(*g*) *Richards v. Morgan*, 4 B. & S. 641.

(*h*) *Fleet v. Perrin*, L. R. 3 Q. B. 536.

(*i*) *Ib.* See *Pennell v. Meyer*, M. & Rob. 98, 8 C. & P. 470.

(*k*) *Fleet v. Perrin*; *Lady Dartmouth v. Roberts*, 16 East, 334.

(*l*) Rs. April, 1880, r. 18.

(*m*) *Percival v. Caney*, 4 De G. & Sm. 610; *s.c. nom. Stanton v. Percival*, 5 H. L. 257.

(*n*) *M'Intosh v. G. W. R.*, 4 De G. & Sm. 544; *Gibbons v. Waterloo Bridge Co.*, 1 Coop. 385; see *Hendrie v. Thompson*, 1 Ir. Ch. Rep. 278.

(*o*) *Per Bruce*, V.-C., 4 De G. & Sm. 546; see *per Cairns*, L. J., L. R. 2 Ch. App. 354.

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Answer of
guardian not
evidence
against infant
or lunatic.

Of married
woman.

Reading docu-
ments from
answer.

discovery (*p*). But, the answer of a guardian *ad litem* cannot be read against the infant (*q*), nor the answer of a guardian, or (*semble*) of the committee, of a lunatic against the lunatic, or his estate or representatives after his death (*qq*), for as a general principle no one can bind another by an admission unless he has an express or implied authority for that purpose (*r*). The answer is, however, binding on the guardian or committee for all time and in any other character which he may possess (*s*). The answer of a married woman cannot be read against her husband, either during or after the coverture, or even against herself, except in an action seeking to charge her separate estate (*t*). If a party in his answer sets out a document which he admits to be in his possession, the document may be read in evidence by the party interrogating without more formal proof (*u*); but *semble*, that documents simply referred to in an affidavit of documents or the schedule as being in the party's possession or power cannot be so read, for the affidavit does not admit their genuineness, or that the documents described as copies are true copies, but only that the pieces of paper are in his possession or power, the proper course in such a case being to give notice to produce them (*x*). A party who has pleaded a document which is admitted by his opponent *with a reference to it when produced*, is not entitled at the hearing to read its contents from his pleading without producing it (*y*); but if there is a sufficient admission in an answer of a document, with its contents, *i.e.*, a substantial admission, it need not be produced, even though unstamped (*z*). By the Chancery Procedure Act (15 & 16 Vict., c. 86) (*a*), upon a *motion for a decree* or decretal order, or an injunction or receiver, the answer was, for the purposes of the motion,

(*p*) See *Berkeley v. Stand. Disc. Co.* (No. 2), C. A., 13 Ch. D. 97.

(*q*) *Percival v. Caney*, 4 De G. & Sm. 61; *s.c. nom. Stanton v. Percival*, 5 H. L. 257; Ord. XIX. r. 17, and Ord. XXXIV. r. 4.

(*qq*) *Ib.*

(*r*) *Per* Lord Cranworth, L. C., *ib.* 273.

(*s*) *Ib.*

(*t*) *Clive v. Carew*, 1 J. & H. 207; *Callow v. Howle*, 17 L. J. Ch. 71.

(*u*) *Wilson v. Thornbury*, L. R. 10 Ch. App. 239; *Lett v. Morris*, 4 Sim. 607.

(*x*) See *per* Mellish, L. J., *ib.* 244.

(*y*) *Cox v. Allingham*, Jacobs, 337, 339; *Dowling v. Legh*, 3 Jones & La T. 716; *v. post*, p. 122, as to giving notice to inspect documents so pleaded.

(*z*) *Lett v. Morris*, 4 Sim. 607, 610; *MacGowan v. Smith*, 26 L. J. Ch. 8.

(*a*) SS. 15, 59.

directed to be treated as an affidavit of the defendant, and, therefore, open to cross-examination (b), but at the *hearing of a cause* in the ordinary way, an answer was not regarded as an affidavit in favour of the defendant, although such parts as the plaintiff might think fit to use were evidence in his favour (c). A defendant, however, might make his answer evidence by filing an affidavit, affirming generally that all the statements contained in his answer were true, and then the plaintiff was entitled to cross-examine him upon it (cc).

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(b) See *Wightman v. Wheelton*, 23 Beav. 387; *Rheden v. Wesley*, 28 L. J. Ch. 797.

(c) *Ib.*

(cc) *Ib.*

CHAPTER VII.

DISCOVERY OF DOCUMENTS.

SECT. 1.—*Disclosure of Documents (a).*

CHAP. VII. IF a party is aware, from the fact of their being disclosed
Sect. 1. in some pleading or affidavit, or otherwise, of the existence in the possession or power of any other party of documents relating to the matters in question in the action or other proceeding, which he is desirous of inspecting, and can, if necessary, satisfy the requirements of Order XXXI. r. 18, by making the affidavit thereby prescribed (*b*), he can at once give notice, in the prescribed mode, of his desire to inspect them (*c*) so as to put himself in a position, if necessary, to apply for an order to that effect (*d*); but if, as is more often the case, he is ignorant of what documents his opponent may have, and unable to give satisfactory evidence in support of his application to inspect, he must apply for an order for the disclosure of documents upon oath by his opponent (*e*); and this he may do, where the discovery is necessary for the purpose of prosecuting or defending the action, even though he may be in contempt for non-compliance with an order for discovery or otherwise (*f*), though, in the former case, the giving of discovery by his opponent may be postponed until he has given it himself (*g*). In Probate actions, an affidavit of documents may be ordered in addition to the usual affidavit of testa-

Application
for affidavit of
documents.

(a) See as to discovery of documents in divorce and matrimonial causes, *Winscom v. W.*, 3 S. & T. 383 n., and *Pollard v. P.*, *ib.* 613.

(b) *V. post*, p. 129. (c) Ord. XXXI. r. 14, *post*, p. 122. (d) *Ib.* r. 18.

(e) *Ib.* rr. 11—12. "Production on oath," and "discovery on oath," mean that the party is to be put to his oath to state how far he admits the possession of relevant documents (*Lamb v. Orton*, 1 Drew. 414).

(f) *Haldane v. Eckford*, L. R. 7 Eq. 425; *Plumbe v. P.*, 3 Y. & C. 622; *Wilson v. Bates*, 3 Myl. & Cr. 197.

(g) *Haldane v. Eckford*.

mentary scripts (*h*). In an action for discovery, if the answer to interrogatories contains a full and sufficient disclosure of documents, an affidavit of documents should not be applied for (*i*). Under special circumstances the party called upon for the affidavit may, in addition to the particulars required by the ordinary form (*k*), be required to disclose the *character* or *capacity* in which he holds the documents (*l*). The time to be allowed the party called upon to make the affidavit for doing so is not prescribed by the rules, but is left to the discretion of the Court, and must depend upon the circumstances of the case, *e.g.*, the number and volume of the documents and their locality: in the Court of Chancery *seven days* were allowed in ordinary cases (*m*), and the like period for producing the documents after the affidavit had been filed. The time allowed should be expressed in the order for the affidavit, but it is no longer essential that the copy order served upon the party or his solicitor should be indorsed with any notice of the consequences of disobedience in order to its being enforced by attachment (*n*).

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Time for
making
affidavit.

Interlocutory orders for production are made upon two principles only, *viz.*, security pending litigation, and discovery for the purposes of the suit (*o*), but it is no ground for refusing production that the discovery sought is the same as the party would obtain if he succeeded in obtaining a judgment at the hearing, so as to be, to that extent, an anticipation of the judgment, if it be also necessary for the purposes of the action (*p*).

It is no longer necessary, as under the former Common Law Practice, to trace any one or more documents to the possession of the party from whom the discovery is sought (*q*), and, under ordinary circumstances and where the application is made at the proper stage of the action or proceedings, an

What grounds
for application
must be shewn.

(*h*) *Hunt v. Anderson*, L. R. 1 P. & D. 476; see *per* Warren, J., L. R. (Ir.) 1 Ch. D. 310.

(*i*) *Barnard v. Hunter*, 1 Jur. N. S. 1065.

(*k*) *V. post*, p. 111, *Affidavit of Documents*. For the ordinary form of summons see App. p. 195, and for a form *after judgment*, *ib.* See, as to the time for applying, *ante*, pp. 13 *seq.*

(*l*) *Boven v. Pearson*, 8 L. T. 495; see *Hambrook v. Smith*, 17 Sim. 209.

(*m*) See the form in Seton, vol. 1, p. 133. Four days is the usual allowance now.

(*n*) *Thomas v. Palin*, C. A., 21 Ch. D. 360. See Cons. Ord. XXIII. r. 10.

(*o*) *Per* Leach, V.-C., *Lingen v. Simpson*, 6 Madd. 290, 291.

(*p*) *Chichester v. Lord Donegal* (No. 1), L. R. 4 Ch. App. 416; *Bishop of Winchester v. Bowker*, 29 Beav. 479; see *Rep. Costa Rica v. Strousberg*, C. A., 11 Ch. D. 323.

(*q*) *Anon.*, W. N. 1876, 24; see *ib.* 1875, 281.

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Prima facie
evidence or
reasonable
presumption of
existence of
documents
required.

order will be made almost as a matter of course without any affidavit (the necessity for which is expressly dispensed with by the rules) (*r*) unless the pleadings show that the *discovery cannot possibly be wanted* (*s*), or the opponent (on whom the *onus* of objecting lies) gives some *good reason against it* (*t*), or, from the nature of the action there are reasonable grounds for believing that the party against whom the application is made *has no such documents* (*u*).

In a recent case before the Appeal Court in Ireland (*x*), Fitzgibbon, L. J., said: "We do not decide that, as a matter of right, a plaintiff or defendant, under all circumstances, and without bringing any facts before the Court, can obtain an order for the discovery of documents under Order XXXI. r. 11. The subject-matter of the rule is documents which are or have been in the possession or power of a party to the action relating to some matter in question, and I think the possession of some such documents by the party against whom the order is made, or at least some reasonable grounds for believing that he has or has had them in his possession, must be shewn. The Court may require an affidavit to shew such reasonable grounds if they do not appear upon the pleadings" (*y*). A similar view of the rule has been taken in our own Courts, chiefly on the ground that the fact of an order being required shews that the application is not a matter of course (*z*). On the other hand, the existence of any such discretion was recently questioned by the Court of Appeal (*a*), Cotton, L. J., expressly saying that he in no way favoured such a view (*b*). The material question, at any rate, seems to be, *not whether documents relating to the matters in question are, or have been, in the possession*

(*r*) Ord. XXXI. r. 12; see *Rochdale Canal Co. v. King*, 15 Beav. 11. There is a *discretion*, however, as to requiring one (*v. post*).

(*s*) *Anon.*, W. N. 1875, 231, 260; *ib.* 1876, 24, 53; see *Wilson v. Raffalovich*, C. A., 7 Q. B. D. 553.

(*t*) See *Dickson v. Harrison*, 47 L. J. Ch. 686; *Bray v. Finch*, 1 H. & N. 468 (where the application was refused as being unnecessary and not *bond fide*); *Newall v. Telegraph Co.*, L. R. 2 Eq. 756.

(*u*) In the Court of Chancery, discovery of documents was considered a matter of *strict right*, irrespective of any question of benefit to be derived from it (see *per Kindersley*, V.-C., 11 W. R. 399, 414), and the rule would seem to be the same now (see *per Cotton*, L. J., 7 Q. B. D. 560). See, however, *Lane v. Gray*, L. R. 16 Eq. 552, and *Dickson v. Harrison*, *supra*.

(*x*) *Healy v. Smith*, 4 L. R. (Ir.) 72, 79; see *per Palles*, C. B., in *Powell v. Heffernan*, *ib.* 703, 710—1.

(*y*) See *per Denman*, J., 40 L. T. 818.

(*z*) See *Johnson v. Smith*, 36 L. T. 741; *per Chitty*, J., 47 *ib.* 577.

(*a*) *Wilson v. Raffalovich*, 7 Q. B. D. 553.

(*b*) *ib.* 560.

of the opposite party, but whether such documents in fact exist; if so, the object of the rule is discovery whether any of them are in his possession or power (c). If there is *prima facie* evidence or even a reasonable probability of the existence of documents relating to some question or issue in dispute, one party is entitled to appeal to the oath of the other, as to such documents being in his possession or power (d); and the very nature of the property claimed in an action may raise a strong presumption of the existence of documents relating to the title to it, and therefore to a matter in question in the action, and that they are in the possession of the party alleging such title, as being the proper person to have the custody of them (dd). On the other hand, the order should not be made where there are reasonable grounds for believing that it would be illusory, by reason of there being no such documents in existence. Thus, where from the nature of the action (for seduction), there was no presumption that there were documents in existence in relation to the matters in question, the application was refused in the absence of an affidavit in support (e). The only meaning and intention of that part of the rule which dispenses with the necessity for an affidavit was to relax the inflexible rule laid down in the Common Law Courts, that there must be, as a condition precedent, an affidavit showing clearly the possession by the opposite party of at least one relevant document (ee). There is a discretion, therefore, as to requiring such an affidavit to show reasonable grounds for the presumption of the existence of such documents, if they do not appear upon the pleadings (f). Where the application is made before or after the usual time (g), an affidavit may be required showing, in the former case, that it is for some reason important to have an affidavit of documents at once (h), and, in the latter, giving some explanation of the delay (i). Affidavits in sup-

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Affidavit may
be required in
support.

- (c) See *per* Palles, C. B., *ubi supra*; *per* Denman, J., 40 L. T. 818.
- (d) See *Powell v. Heffernan*; *per* Denman, J., *ubi supra*.
- (dd) See *per* Palles, C. B., *ubi supra*; *Healy v. Smith*.
- (e) *Johnson v. Smith*, 36 L. T. 741 (see on this case *per* Palles, C. B., 4 L. R. (Ir.) 709); *Cleary v. Fitzgerald*, 1 L. R. Ir. 492.
- (ee) See *per* Denman, J., 40 L. T. 818; *per* Lindley, J., *ib.* 821.
- (f) *Johnson v. Smith*, 36 L. T. 741; *Healy v. Smith*, 4 L. R. Ir. 72.
- (g) *V. ante*, pp. 13 *seq.*
- (h) *Per* Cleasby, B., 4 Ex. D. 8; *v. ante*, pp. 14 *seq.*
- (i) *Ellis v. Ambler*, 36 L. T. 410; but see *Lond., &c. Ins. Co. v. Davies*, 5 Ch. D. 775, and *ante*, p. 17.

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Affidavit may be made on behalf of the party where incapable of making it himself.

Order cannot be made against non-party.

port of applications for discovery should show merits and that the discovery is necessary and material (*ii*), and should, apparently, be made by the party himself as well as by the solicitor (*k*), though this does not appear to be essential.

Where the party from whom the discovery is sought is, in the nature of things, incapable of taking an oath, or unable to give the discovery required satisfactorily, an order may be obtained for an affidavit to be made on his behalf by some other qualified person (*l*). Thus, the next friend or guardian may make the affidavit on behalf of an infant (*m*), and the next friend, guardian, or committee on behalf of a lunatic, but an order for an affidavit by the next friend of a married woman was refused, where she herself had already made one (*n*). In one case, where the party was unable through ill-health to make the affidavit himself, it was permitted to be made by a member of his family (*o*). The discovery, in such cases, will be confined to documents in the possession or power of the person on whose behalf the affidavit is made (*p*). In all such cases of vicarious discovery the order for the affidavit should not be absolute in its terms, but liberty should be reserved to the party against whom it is made to apply to the Court to be relieved against it, on its being made satisfactorily to appear that he is unable to procure the affidavit to be made by the party designated (*q*). Where the party is a plaintiff, a stay of proceedings may be asked for until the discovery has been given (*r*). Plaintiffs and defendants *on the record* are the only parties who can be recognised as such, and if an order for discovery has been made upon them they are bound to obey it just as if they were litigating for their own benefit (*s*), and compliance with such an order

(*ii*) See *Mollett v. Enequist*, 25 Beav. 609.

(*k*) *Ib.* Cf. C. L. P. Act, 1854, s. 50. Rule 12, however, speaks only of filing an affidavit. A form is given in the Appendix, *post*, p. 200.

(*l*) See *Ranger v. G. W. R.*, 4 De G. & J. 74 (decided upon ss. 13—20 of the Chancery Procedure Act, 1852); *Crowe v. Bank of Ireland*, Ir. Rep. 5 Eq. 578. See as to discovery from corporations, foreign states, &c., *post*, p. 159.

(*m*) *Crowe v. Bank of Ireland*; *Higginson v. Hall*, 10 Ch. D. 235; *Rippen v. Dolman*, 2 W. R. 432. Discovery cannot be obtained from the next friend personally (see *Re Corsellis*, 31 W. R. 414).

(*n*) *Hardwick v. Wright*, 11 Jur. N. S. 297 (see, however, on this case *per* Lord Hagan, L. C., Ir. Rep. 5 Eq. 581).

(*o*) See *Williams v. Hodge*, 1 H. & T. 575, 1 Macn. & G. 516.

(*p*) See, as to the form of order in such cases, Appendix, *post*, p. 195 (*i*).

(*q*) *Crowe v. Bank of Ireland*; *Ranger v. G. W. R.*, *supra*; see Appendix, *post*, p. 195.

(*r*) *Higginson v. Hall*; *Crowe v. Bank of Ireland*, *supra*; cf. Ord. XXXI. r. 20.

(*s*) *Wilson v. Raffalovich*, C. A., 7 Q. B. D. 553.

will not be dispensed with because the real litigant is unable, by reason of their being out of the jurisdiction of the Court, to procure the nominal litigants to make the affidavit, even though the action may be dismissed in consequence (t). CHAP. VII.
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There is no difference, as regards the liability to make an affidavit of documents between actions for the recovery of land or otherwise involving questions of title and other actions (g), and it is no reason for declining to make the affidavit that the title of or case made by the applicant is denied (h), or that the documents of which disclosure is sought, or some of them are, or may be, privileged from production or inspection (i) (the right to which will not be gone into then, but determined, if at all, subsequently), or that the party called upon to do so is not in a position to produce the documents, or that making the affidavit would be an admission of the possession of documents criminating the party making it (k); the affidavit must in all cases be made, and the protection, if desired, claimed therein. But the granting of the discovery may be postponed (l), under Order XXXI. r. 19, and this will be done where the making of the affidavit would be a useless expense at the then stage of the proceedings (m). Party bound to make affidavit though not bound to produce.

SECT. 2.—Of the affidavit of documents.

The affidavit of documents (n) which a party can be called upon to make is an affidavit showing what documents relating to any of "the matters in question" between him and his opponent he then has or at any time has had (in the case of the latter accounting for them), and which, if any, of the former class he objects (or is unable) to produce, and, under special circumstances, the character and capacity in which he Sect. 2.
Affidavit of documents.

(t) *Ib.*

(g) *New British Co. v. Peed*, 3 C. P. D. 196; *Fortescue v. F.*, 34 L. T. 847; *Powell v. Heffernan*, 4 L. R. (Ir.) 703; *Magdalen Hospital v. Knotts*, 21 S. J. 610; *Wrentmore v. Hagley*, 46 L. T. 741; *Daniel v. Ford*, C. A., 47 L. T. 475. See *Rumbold v. Forteach*, 3 K. & J. 752, for a form of order.

(h) *Ante*, p. 85 (i).

(i) *Post*, p. 113.

(k) *Bunn v. B.*, 4 De G. J. & S. 316. But the defendant in action for penalties is not liable to make an affidavit (*Hunnings v. Williamson*, 10 Q. B. D. 459).

(l) *V. ante*, p. 26, *Postponing Discovery*.

(m) *Dickson v. Harrison*, 47 L. J. Ch. 686.

(n) See Steph. Dig. Ev. Art. 1, as to the meaning of "documents."

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All parties
must join in
affidavit.

Meaning of
words "matters
in question."

Definition
suggested by
Brett, L. J.

holds them (o). Where there are several plaintiffs or defendants, all of them must join in the affidavit unless some special reasons are shown to the contrary (p), though the action would not be dismissed if it were shown satisfactorily that one of the parties was not in a condition to make an affidavit (q). An affidavit by the party's solicitor is not a sufficient compliance with the order (s).

The words "matters in question in the action" do not necessarily mean *the issues or questions raised by the pleadings (t)*, because there may be none or the order may be made before issue is joined, or *the subject-matter of the action or thing in dispute (u)*, but include *all documents which can throw any light or have any bearing upon the determination of such issues or questions (x)*, whether evidence *per se* or not (y), e.g., documents relating to the amount of *damages* recoverable (z), or which may have a considerable bearing on the *costs* to be given at the trial (a). The following definition of the words "relating, etc.," was lately suggested by Brett, L. J. (c): "Any document, not only which is *evidence*, but which you may not unreasonably suppose contains information which *may* (not which *must*) directly or indirectly enable you to advance your own case or damage your adversary's case, must be set out. I say *directly* or *indirectly*, because it may be a document which could fairly lead to a train of inquiry which may have been one of these effects" (cc).

(o) The affidavit is in fact in the nature of a carefully prepared *answer* to a searching interrogatory as to documents (see *Rochdale v. King*, 15 Beav. 11, *per* Romilly, M. R., and the form H. 15 in the R. S. C. April, 1880).

(p) *Walker v. Kennedy*, 5 W. R. 396; *Doolin v. Dixon*, 16 *ib.* 796; *Wilson v. Raffalovich*, C. A., 7 Q. B. D. 563.

(q) See *per* Cotton, L. J., *ib.* 561; *cf.* *Hartley v. Owen*, 34 L. T. 752, where, on an application to dismiss, the affidavit of the wife of an absconding party was accepted as sufficient.

(s) *Wilson v. Raffalovich*, *supra*; see, however, *Barnett v. Hooper*, 1 F. & F. 412, 467.

(t) *Pape v. Lister*, L. R. 6 Q. B. 242.

(u) See *per* Lindley, J., 40 L. T. 821.

(x) *Mansel v. Feeny* (No. 2), 2 J. & H. 320; *Jenkins v. Bushby*, 35 L. J. Ch. 400.

(y) See *Hutchinson v. Glover*, 1 Q. B. D. 138; 33 L. T. 834 (C. A.). The producing party is not thereby precluded from objecting to their being used against him at the trial (*ib.*).

(z) *Pape v. Lister*, *supra*.

(a) See *per* James, L. J., L. R. 7 Ch. App. 98; *per* Wigram, V.-C., 2 Ha. 391.

(c) In *Compagnie Financière v. Peruvian Guano Co.*, C. A., 48 L. T. 22, 23.

(cc) See also *per* Baggalay, L. J., *ib.*

Upon the question of possession or non-possession, relevancy or irrelevancy, the deponent's oath is accepted as conclusive (*d*), but when the possession of relevant documents is once admitted, they must be produced, unless they (1) manifestly can have no bearing on the issues or questions to be tried (*e*), or (2) relate exclusively to the case of the party disclosing them, or (3) are otherwise privileged documents. It is the duty of the party called upon to make the affidavit to ascertain for himself by a precise and complete examination the nature and contents of documents in his possession or power, so as to be able to state whether they relate to the matters in question or not, and if so, whether they are material to his opponent's case or not, and if it should appear that he has not done so, or has done so laxly and incompletely, the Court should give his opponent the most ample means of investigation as to their nature and contents (*f*). Their number or bulk is not a sufficient excuse for an imperfect examination of them, as the Court will, upon a proper application, allow the necessary time to prepare a sufficient and satisfactory affidavit (*g*).

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All relevant documents must be produced unless privileged.

Duty of party to ascertain nature of documents in his possession.

As an admission that documents are in the possession or power of the party making the affidavit is, in general, conclusive against him (*h*), it is necessary to consider what documents are deemed to be so. A party must set out *every document* which he has in his possession or power (and all which he has a *right to inspect*, provided he can enforce that right, are in his power) whether he is bound to produce them or not (*i*). Although, therefore, the fact that documents are not in the exclusive possession of the party required to make the affidavit, or of his agent, but in the joint possession of himself and other persons not before the Court, or of an agent on behalf of himself and such other persons, may be a very good reason for not *producing* them (*k*), yet that rule does not

What are documents in a party's possession or power.

Documents in joint possession.

(*d*) *V. post*, p. 119.

(*e*) *Mansell v. Feeny*, 2 J. & H. 320; Dan. 1687.

(*f*) *M'Intosh v. G. W. R.*, 1 Sm. & Giff. 4, 10, *per* Stuart, V.-C.; *Manby v. Bewicke* (No. 3), 8 De G. M. & G. 476; see *Combe v. Corporation of London*, 1 Y. & C. Ch. 631.

(*g*) See *per* Lord Lyndhurst, L. C. 15 L. J. Ch. 81; *Combe v. Corporation of London*, *supra*.

(*h*) *Plant v. Kendrick*, L. R. 10 C. P. 692. See, however, *post*, p. 131, as to explaining away an inadvertent admission in this respect.

(*i*) *Per* Lord Lyndhurst, L. C., 1 Phill. 226; *Lazarus v. Moxley*, 5 Jur. N. S. 1119; *Swanston v. Ishman*, C. A. 45 L. T. 360.

(*k*) *V. post*, p. 133.

CHAP. VII. apply to discovery ; in which the only question is, whether, as
Sect. 2. between the plaintiff and the defendant, the plaintiff is entitled to an answer to the question he asks ; for if he is, the defendant is bound to answer it satisfactorily, or, at least, to show the Court that he has done so as far as the means of his information permit (*l*). In *Clinch v. Financial Corporation* (*m*), Lord Hatherley, when Vice-Chancellor, said, "The attempt has often been made in one way or the other to escape the personal order for production, on the ground of the ownership of the documents being in a corporate or partnership body. I myself recollect, as a pleader, having attempted it unsuccessfully in *Taylor v. Rundell*. But it has always been decided that the parties must give all the information in their power, even if the documents be not in their possession in this sense, that they cannot be produced without an order for the purpose, because they are in the joint possession of the directors and others. The Court says, *if you have any possession, that is enough. There may be grounds for not producing, but even then you must give discovery*" (*n*). There is no rule plainer than that a person, whether a partner or not, must discover all books which relate to the matters in question, whether he is accountable alone or with others (*o*). It is no excuse for a party to say that he cannot give the requisite information because the documents are *wrongfully withheld from him*, or are *in a distant part of the world*, as the Court will allow him the necessary time for producing them (*p*). If the party is not in a position to produce the documents, if so required, the affidavit must show the nature of the joint ownership, so as to enable the Court to determine whether it will order them to be produced notwithstanding (*q*), and state the consequent objection or inability to produce, but it is not necessary, as in the case of an answer as to documents, to show that *permission to produce them has been refused* (*r*).

Inability to produce no ground for not disclosing.

Affidavit must show nature of joint possession.

(*l*) See *per* Lord Cottenham, L. C., in *Taylor v. Rundell*, Cr. & Ph. 104, 111—3 ; *Mertens v. Haigh*, 3 De G. J. & S. 528.

(*m*) L. R. 2 Eq. 271, 273.

(*n*) See *Swanston v. Lishman*, C. A. 45 L. T. 360.

(*o*) *Per* Jessel, M. R., 45 L. T. 361 ; see *Taylor v. Rundell* ; *Mertens v. Haigh*, 3 De G. J. & S. 528.

(*p*) See *per* Lord Cottenham, L. C. Cr. & Ph. 113 ; *per* Lord Lyndhurst, L. C. 1 Phill. 225 ; *Mertens v. Haigh*, *ubi supra*.

(*q*) *Bovill v. Cowan*, L. R. 5 Ch. App. 495 ; *Hadley v. McDougall*, 7 *ib.* 312 ; *Kearsley v. Philips*, 10 Q. B. D. 36, 465 (C. A.).

(*r*) See *Kearsley v. Philips*, distinguishing on this ground *Mertens v. Haigh*,

Documents which are in the hands of third parties under a lien upon them created by the act of the party himself are deemed to be at least *in his power*, if not in his constructive possession, and must therefore be included in the affidavit (*s*), unless he is denied *access* to them by the holder (*t*), but documents in the possession of a third person under a covenant to produce them at the deponent's expense need not, and *a fortiori*, therefore, need not be produced (*u*). A party need not include in his affidavit documents held by him as a *mere depositary* (*x*). In all cases where there is any doubt as to the deponent's being able to produce documents, owing to the existence of a joint possession of or property or interest in them being vested in a third person not before the Court, or where for any other reason it is doubtful whether documents can fairly be considered as being in the deponent's possession or power, in the ordinary sense (*y*), or where, as is sometimes the case, it may in effect be a *conclusion of law* as to what is their custody and control (*z*), the deponent should give the fullest information in his power as to their position, setting out the facts relating thereto, so as to enable the Court to decide the question (*a*).

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Documents in
hands of
agents, etc.,
under lien.

Fullest
information
should be
given.

A form of affidavit, which is substantially the same as that previously used in the Court of Chancery (*b*), is provided by the rules (*c*), and despite the statement that it may be used "with such variations as the circumstances may require" (*d*), it was not intended to be merely optional, but to serve as the common form (*e*), any departure from which will be viewed with suspicion unless satisfactory reasons are shown for such a course (*f*). Thus, the omission of any statement as to documents formerly in the party's possession, and as to what

Statutory form
of affidavit.

3 De G. J. & S. 528, and *Taylor v. Rundell*, 1 Y. & C. Ch. 128; *S. C.* 1 Phill 222, and explaining *Hutchinson v. Glover*, 1 Q. B. D. 138.

(*s*) See *re Cameron's Coalbrook Co.*, 25 Beav. 1; *Clinch v. Fin. Corp.*, L. R. 2 Eq. 271; *Lochett v. Cary*, 3 N. R. 405; *post*, p. 134.

(*t*) See *Kettlewell v. Barstow* (No. 2), W. N. 1872, 95.

(*u*) *Bethell v. Casson*, 1 H. & M. 806. See *Vivian v. Little*, LXXV. L. T. 108.

(*x*) *Forman v. Neville*, 14 L. J. Ch. 33.

(*y*) See *Clinch v. Fin. Corporation*, L. R. 2 Eq. 271.

(*z*) *Lacharme v. Quartz Mining Co.* (No. 2), 31 L. J. Ex. 509.

(*a*) *Ib. Clinch v. Financial Corporation*, *ubi supra*.

(*b*) See *Seton*, vol. 1, p. 138.

(*c*) Jud. Act, 1875, sched. App. B. No. 9 (*v. post*, p. 191).

(*d*) Ord. XXXI. r. 14.

(*e*) *Per Lindley, J., Anon.* W. N. 1876, 39; see *Gardner v. Irvin*, C. A. 4 Ex. D. 49; *Ledwidge v. Mayne*, Ir. Rep. 11 Eq. 463.

(*f*) See *Boyd v. Petrie*, 20 L. T. 935; *Woodhatch v. Freeland*, 11 W. R. 397.

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Grounds of
objection or
inability to
produce must
be stated.

has become of them, will render the affidavit insufficient (*g*). It should be full and distinct in its terms, as the party seeking discovery is bound by it, and will be construed strictly, because the other side cannot adduce evidence to contradict it (*h*). Objections or statements of inability to produce must be distinctly made (*i*), and *the grounds stated as allegations of fact and verified* (*k*). It is not enough to say merely that the documents are privileged, which is a statement of a matter of law, or to state the grounds vaguely and generally, but the facts should be set out from which it may be seen whether that view of the law is right or not (*l*); neither is it enough for the party to say that he is advised and believes that documents are privileged, where such belief is admittedly founded not upon a personal examination of the documents in question but upon information derived from others (*m*), though in ordinary cases it would be sufficient (*n*). In affidavits, as in pleadings, doubtful or ambiguous statements will be construed in the sense most unfavourable to the deponent (*o*), and where there are inconsistent or contradictory statements the opposite party may adopt and act upon that which is most in his own favour (*p*). It is not necessary that the schedule should *show positively* that documents are of the character ascribed to them in the affidavit itself, provided that the party swears that they are such, and the schedule is such as not on the face of it to contradict the affidavit (*q*). *Prima facie* every document described in the affidavit must be taken to be as it is described (though the Court is of course entitled to look to the schedule to see whether the documents specified therein can possibly fall within the description given of them in the body of the affidavit) (*r*), but if it can be shown to

(*g*) *Wagstaff v. Anderson*, 39 L. T. 332; *Anon.* W. N. 1876, 39; *Rishton v. Grissel* (No. 2), 14 W. R. 789.

(*h*) See *per Cotton*, L. J., 4 Ex. D. 53; *Bovill v. Cowan*, L. R. 5 Ch. App. 495; *Manby v. Bewicke*, 8 De G. M. & G. 470 (party cannot be cross-examined upon it at trial, unless used as affidavit).

(*i*) *Fortescue v. F.*, 24 W. R. 944.

(*k*) *Gardner v. Irvin*, C. A. 4 Ex. D. 49; *Kain v. Farrer*, 37 L. T. 469.

(*l*) See *per Cotton*, L. J., 4 Ex. D. 53.

(*m*) See *Manby v. Bewicke*, *supra*.

(*n*) *V. ante*, p. 45.

(*o*) See *Thomas v. Rawlings*, 27 Beav. 140; *Lewis v. Pennington*, 29 L. J. Ch. 670; *Nordon v. Defries*, 8 Q. B. D. 508.

(*p*) See *Bowes v. Fernie*, 3 Myl. & Cr. 632.

(*q*) See *per Wood*, V.-C., 2 H. & M. 5.

(*r*) See *per Wood*, V.-C., *ubi supra*; *Gardner v. Irvin*, C. A. 4 Ex. D. 49; *Lyell v. Kennedy* (H. L.), 52 L. J. Ch. 386.

demonstration on the face of the affidavit and the schedule CHAP. VII.
Sect. 2. itself that some of them do not answer the description, they will of course be excepted (s). If an affidavit claiming protection for documents, some of which are, while others are not, privileged, does not sufficiently show which are entitled to protection, production may be ordered of all, or the party may be required to make a further affidavit identifying the documents entitled to protection, which he will be allowed to do under ordinary circumstances (t).

The sole object of the affidavit being to enable the Court to make an order for the production of the documents, if it think fit, *such a description of the documents as would enable production, if ordered, to be enforced, is sufficient* (u); they must be so far identified that the Court can see that the documents referred to are produced if required, and if words are used, which, if true, protect the documents, no further particularity is necessary than in the case of documents for which protection is not claimed (x). It is not necessary, therefore, that such a description should be given of documents for which protection is claimed as to put the opposite party in a position to test the truth of the affidavit thereby, or of the grounds upon which the protection is claimed (y), or to prevent the possibility of other documents being fraudulently substituted for them on production (z). Thus, although a description of documents for which privilege is claimed as "certain documents, letters, etc.," without any further identification, or as "a bundle of deeds and papers relating exclusively to my title," is insufficient (a), deeds or other privileged documents of the same class, may be numbered and tied up in a bundle, initialled by the deponent so as to earmark it, and described accordingly (b). The applicant is not entitled

What is a
sufficient
description of
documents.

Description by
bundles, etc.

(s) See *per* Knight Bruce, L. J., 8 De G. M. & G. 1873; *Lyell v. Kennedy* (H. L.).

(t) See *per* Cotton, L. J., 4 Q. B. D. 88; *Parsons v. Robertson*, 2 Keen, 605.

(u) *Taylor v. Batten*, C. A. 4 Q. B. D. 85; *Bewicke v. Graham*, C. A., 7 *ib.* 400, 409.

(x) *Ib.*

(y) *Ib.* See *per* Cotton, L. J., 4 Ex. D. 53.

(z) See *per* Wigram, V.-C., 2 Ha. 383.

(a) See *Fortescue v. F.*, 34 L. T. 847; *Phelps v. Olive*, 4 Beav. 549 n.; *Price v. P.*, 48 L. J. Ch. 215.

(b) See the form given in *Taylor v. Batten*, *supra*, and followed in *Bewicke v. Graham*, C. A. 7 Q. B. D. 400, which has since become the stereotyped form in the case of privileged documents. See also *Christian v. Taylor*, 11 Sim. 401.

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Prolixity to be avoided.

Where affidavit insufficient, party should apply for further one.

Where privilege claimed party may apply for inspection.

to have the dates of privileged documents and such other particulars as may enable him to discover indirectly their contents (c), or a detailed schedule of title-deeds showing their nature or the names of the parties thereto (d); it is enough that they be described in the manner above indicated. In framing the affidavit and schedules care must be taken to avoid prolixity or impertinence, otherwise it may be ordered to be taken off the file with costs (e), and the objecting party is not bound to point out the particular portions objected to (f). Where there are numerous documents of the same class they should be described in classes in the form given in *Taylor v. Batten*. Thus, letters should not be set out individually, but may be referred to by *bundles* marked as "letters from A. to B.," or any other mark of identification (g). Including documents in the affidavit or schedules is a sufficient and generally conclusive admission of their relevancy, so as to preclude the party from afterwards raising an objection on that score, but a party may be afforded an opportunity of relieving himself, if he can, by affidavit, from an inadvertent admission of possession or control, or failure to claim protection (h). Where the affidavit is informal or insufficient, e.g., from not containing a clear admission or denial of the possession of documents, or a sufficient description to identify them, application should be made for a further and better affidavit (i), for if a party does not object to the description of the documents at that stage, he is precluded at the next, which is that of production, from asking for any further description of them (k). Where the affidavit is technically sufficient, the party who has obtained it should give notice to produce the documents mentioned therein (l), so as to entitle himself to

(c) See *per* Cotton, L. J., 4 Ex. D. 53; *per* Bramwell, L. J., 7 Q. B. D. 412.

(d) See *per* Cotton, L. J., 4 Q. B. D. 89, explaining *Fortescue v. F.*, 34 L. T. 847; *per* Lindley, L. J., 26 W. R. 354; *Contra*, *Taylor v. Oliver*, 45 L. J. Ch. 774.

(e) See *Boyd v. B.*, 11 L. T. 325; *Taylor v. Kelly*, W. N. 1876, 139; *Walker v. Poole*, 51 L. J. Ch. 846; *Owens v. Emmens*, XX. S. J. 118.

(f) *Ib.*

(g) See *Walker v. Poole*, 51 L. J. Ch. 840.

(h) *Plumley v. Horrell*, W. N. 1868, 240; *Greenwood v. G.*, 6 W. R. 119; *Dan.* 1681; but see *Plant v. Kendrick*, L. R. 10 C. P. 692.

(i) *Gardner v. Irvin*, C. A. 4 Ex. D. 49. As an alternative, a summons may be taken out "to consider the sufficiency of the affidavit," as under the old Chancery practice (see *Dan.* 1680), when questions as to production may be raised (see *Nicholl v. Jones*, 2 H. & M. 588).

(k) See *per* Brett, L. J., 52 L. J. Q. B. 72, 10 Q. B. D. 201—2.

(l) See Ord. XXXI. r. 14.

inspect them, and apply for an order to inspect such of them as protection is claimed for, if he challenges the claim to protection (*ll*); and if the documents when produced do not correspond with the description of them as given in the affidavit, he should apply for a further affidavit to be made, to enable him to obtain the production of the identical documents (*m*). Where the claim to protection is insufficiently stated, *e.g.*, by not stating or verifying the grounds on which it is based, the opposite party may either apply for a further and better affidavit (*n*), or take out a summons for an order for inspection notwithstanding the objection raised, on the hearing of which application the question of privilege can be decided (*o*).

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Of obtaining a further affidavit of documents.

In considering the sufficiency of an affidavit of documents, the sole question is, *not whether it is true in fact*, but whether it is *technically sufficient* (*p*), and the statements contained in it as to the possession or non-possession of documents, their relevancy or irrelevancy, the description given of them, and the character and effect attributed to them (*q*) are so far *conclusive* as against the opposite party, that he cannot by means of a contentious affidavit impeaching its accuracy call upon the party making it for a further and better affidavit (*r*); that is, he cannot say, "I make an affidavit that I believe, and have good ground for believing, that there are other documents, and therefore a further affidavit of documents ought to be required" (*rr*). As was said by Lord Cottingham (*s*), "It is not because you *suspect* that a defendant has stated facts incorrectly or untruly in his answer, that you are at liberty to disregard these statements. * * * His answer may be open to every possible suspicion, and yet, according to

Affidavit
cannot be
impeached by
contentious
affidavit.

(*ll*) See Ord. XXXI. r. 18.

(*m*) See *per* Wigram, V.-C., 2 Ha. 389.

(*n*) See *per* Cotton, L. J., *Gardner v. Irvin*, 4 Ex. D. 49, 53.

(*o*) *Ib.* A form of summons is given in the Appendix, *post*, p. 196.

(*p*) *Earl of Eglinton v. Lamb*, 35 L. J. Ch. 113.

(*q*) This may, however, sometimes be a question of law (*v. ante*, p. 115).

(*r*) *Jones v. Monte Video Gas Co.*, C. A. 5 Q. B. D. 556, followed in *Bewicke v. Graham*, C. A. 7 *ib.* 400; *Ross v. Dublin Tram. Co.*, 8 L. R. Ir. 213; and *Compagnie Financière v. Peruvian Co.*, 48 L. T. 22.

(*rr*) See *per* Brett, L. J., 48 L. T. 23.

(*s*) 3 Myl. & Cr. 637.

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Insufficiency
must be
established
from internal
evidence or
admission of
party.

Admission
need not be
express.

the practice, the Court, cannot reject it." Thus, evidence is not admissible to show that documents have been inadvertently or even fraudulently omitted from the affidavit (*t*). If, however, from any *discrepancy or inconsistency appearing upon the face of the affidavit itself* (*u*), as if the deponent were to refer to a schedule as containing six documents when it appeared that there were only five (*x*), or from *other documents disclosed or referred to in it* (*y*), or from some *admission in the pleadings, answer, or other affidavits* (*z*) (i.e., the affidavits made by way of giving discovery, not general affidavits in the action) (*a*), of the party from whom discovery is sought, the master or judge is of opinion that the affidavit is insufficient, he ought to make an order for a *further affidavit* (*b*), and this may be done even after judgment (*c*). Thus, where it appeared from the affidavit of documents and schedule that the deponents had formerly had in their possession documents which the pleadings showed to be material and which were not disclosed in the affidavit, a further affidavit was ordered (*d*), as also in a case where a party in his answer set out a long list of the customers of a business carried on by him, which could not have been made from memory merely, but did not disclose in his affidavit any books relating to such business (*e*). In order to found an application for a further and better affidavit, it is not necessary that there should be an *admission in express terms* of the possession of other documents; the judge may draw the inference that such is the case (*f*); but a *mere suspicion* or surmise that documents have been omitted is not enough; it must at least be a reasonable suspicion, and one founded on the pleadings and affidavits (*g*).

(*t*) *Reynell v. Sprye*, 1 De G. M. & G. 656; *Richards v. Watkins*, 6 Jur. N. S. 168.

(*u*) *A. G. v. Castleford Local Board*, 27 L. T. 644.

(*x*) See *per James, V.-C.*, 21 L. T. 705.

(*y*) See *Imp. Land Co. v. Masterman*, 29 L. T. 559; *Original Hartlepool Coll. v. Moon*, 30 *ib.* 193, 585; *Compagnie Financière v. Peruvian Co.*, 48 L. T. 22.

(*z*) See *Westminster, &c. Co. v. Clayton*, 9 L. T. 534.

(*a*) *Alcock v. Gill*, 21 L. T. 704.

(*b*) *Jones v. Monte Video Gas Co.*, C. A. 5 Q. B. D. 556, followed in *Bewicke v. Graham*, C. A., 7 *ib.* 400; *Welsh, &c. Coll. v. Gaskell*, C. A. 36 L. T. 352.

(*c*) *Richards v. Watkins*, 6 Jur. N. S. 168.

(*d*) *Ross v. Dublin Tram. Co.*, 8 L. R. Ir. 213.

(*e*) *Saull v. Browne*, L. R. 17 Eq. 402; see *Noel v. N.*, 1 De G. J. & S. 468; *Wright v. Pitt*, L. R. 3 Ch. App. 809; *Macfarlane v. Roll*, *ib.* 14 Eq. 580; *Richards v. Watkins*, 6 Jur. N. S. 168.

(*f*) *Per Jessel, M. R.* in *Saull v. Browne*, *ubi supra*.

(*g*) *Wright v. Pitt*, *ubi supra*. For form of summons, *v. post*, p. 195.

The party seeking the discovery, however, is not destitute of all remedy in such cases. If he does not obtain what he considers a fair and satisfactory disclosure, but believes that there must be documents in his opponent's possession to which his recollection has not been called, or that he has taken rather too wide a view in his own favour as to what may or may not be pertinent to the case, he may interrogate as to such documents (*h*), and interrogatories properly framed may force a person to disclose what documents he has in his possession, and the party requiring the production will thereby avoid committing any breach of the practice as to affidavits of documents (*i*). Thus, where privilege is claimed for documents in an affidavit, the party claiming it may be asked whether they do or do not relate to certain matters in question in the action, and as to the ground on which he contends that they are privileged (*k*). If the person who interrogates is not satisfied with the particularity of the description of the documents, he can apply for leave to interrogate further, or that his opponent may be required in his answers to give a more accurate description of them (*l*). A party who is interrogated as to the possession of particular specified documents, cannot answer by reference to a previous affidavit of documents denying the possession of documents in general terms (*ll*). If interrogatories as to further documents have been necessitated by the improper withholding of information by the opposite party, he may be compelled to pay the costs (*m*), and a judge ought to be severe in awarding costs when he finds that expenses have been incurred through a wrongful suppression of material documents (*mm*).

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Interrogatories
as to further
documents.

Party with-
holding docu-
ments may be
ordered to pay
costs.

When the plaintiff, after obtaining an affidavit of documents, amended his bill, he was held to be entitled to a further affidavit as to documents relating to the further matters contained in such amendments (*n*).

(*h*) *Newall v. Telegraph Co.*, L. R. 2 Eq. 756.

(*i*) *Per Brett*, L. J., 5 Q. B. D. 558; see *Swanston v. Lishman*, C. A. 45 L. T. 360.

(*k*) *Catt v. Tourle*, 22 L. T. 775. A claim of privilege cannot be dispute d by affidavit (*Underwood v. Secretary for India*, W. N. 1866, 95).

(*l*) See *per Brett*, L. J., 52 L. J. Q. B. 72.

(*ll*) *Catt v. Tourle*, 22 L. T. 775.

(*m*) *Jones v. Monte Video Gas Co.*, 5 Q. B. D. 556; see *Swanston v. Lishman*, C. A. 45 L. T. 360.

(*mm*) *Per Thesiger*, L. J., 5 Q. B. D. 559.

(*n*) See *Warden v. Peddington*, 32 Beav. 639.

SECT. 3.—*Inspection of documents referred to in pleadings or affidavits (n).*

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Notice to
produce
documents
referred to in
pleadings or
affidavits.

Every party to an action or other proceeding (*o*) is entitled at any time at or before the hearing thereof (*p*) to give notice to *any other party* in whose pleadings (*pp*) or affidavits (*q*) reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor (*r*), and to permit him or them to take copies thereof (*rr*). This rule was necessitated by the change in the rules as to pleading (which forbid documents to be set out at length) (*s*) mainly in order to prevent fictitious documents being introduced into pleadings or affidavits (*t*), and any party may require, and the Court will order, inspection of documents referred to in any other party's pleading or affidavit, unless such last-named party can show sufficient cause for the document not being produced (*u*). The fact that a party requires inspection of a document for the purpose of preparing his defence (or of setting it out in answer to the pleading mentioning or referring to it) (*x*), is a strong reason for ordering inspection (*y*). The document must, apparently, be *relied* upon by the party in his pleading as the foundation of his claim or defence, and not merely stated by way of *inducement* (*z*), and there must be, at

(*n*) See Hare, part IV. ch. iii., § 3; Kerr, 39 *seq.*

(*o*) See, as to the meaning of the terms *party*, *action*, and *proceeding*, Jud. Act, 1873, s. 100.

(*p*) See rs. 15 *seq.* (*post*, p. 124) for the proper mode of giving notice before the hearing.

(*pp*) "Pleadings" includes a *petition* (see *Peyton v. Lambert*, 6 Ir. Ch. Rep. 9) or *summons* (Jud. Act, 1873, s. 100).

(*q*) Apparently, this does not include answers, the rule as to which is that a party is entitled to inspection of all documents so referred to in them as to be *virtually incorporated therewith*.

(*r*) See, as to who may inspect, *post*, p. 124.

(*rr*) Ord. XXXI. r. 14.

(*s*) See Ord. XIX. rr. 24, 27.

(*t*) This has been frequently stated by the late Master of the Rolls. (See *per Chitty, J.*, 48 L. T. 374).

(*u*) *V. post*, p. 124.

(*x*) See C. L. P. Act, 1852, s. 53; *per Willes, J.*, 7 C. B. N. S. 828; *Owen v. Nickson*, 3 E. & E. 608.

(*y*) *Quilter v. Heatley*, C. A., 48 L. T. 373. The notice may be given as between *co-defendants* (*per Jessel, M. R., ib.*).

(*z*) It was upon this principle that the doctrine of *profert* and its equitable extension to instruments other than deeds, rested at Common Law (see *per Williams, J.*, 8 C. B. N. S. 634; *per Crompton, J.*, 3 E. & E. 608; *per Pollock, C. B.* 7 Ex. 242—3). But see *Smith v. Harris*, XXVII. S. J. 554.

least, a *presumption* of its being in the possession or power of the party called upon to produce it (*a*). Thus, production was refused of a letter referred to in a petition in support of the equity relied upon by the petitioner, without setting out any part of its contents, or referring to it when produced, or admitting it to be in his possession (*b*). Reference in an answer to a *part* of a document conferred a right to inspect that part only (*c*), and where words of reference to a document had been inadvertently inserted in a pleading, the Court relieved the party from the effects of such reference by allowing it to be amended by omitting the words of reference (*d*).

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Inadvertent
reference may
be relieved
against.

It was not intended to make the giving of such notice a matter of course in all cases, and no costs will be allowed for giving any notice or making any inspection thereunder, unless it is satisfactorily shown that there were *good and sufficient reasons* for doing so (*e*). The inspection will not be granted to enable a party to fish for a case or find out a defect in that of his opponent, or where the Court sees that it is sought for an improper purpose; the applicant must show a "real and peremptory" need of it (*f*).

Notice not to
be given as
matter of
course.

The rule that discovery will not generally be allowed to a defendant before he has put in his statement of defence (*g*), does not apply to inspection of documents referred to in a party's pleadings or affidavits (*h*). In the case where the above was decided, Jessel, M. R., said (*i*):—"The suggestion is that though the words of the rule (*k*) are general, it is a sufficient cause for not making the order that the defendant has not put in his defence. I should have supposed that was a reason just the other way. The defendant wants to see the documents for the very purpose of putting in his defence, which is only reasonable. The plaintiff may have set them out imperfectly. Indeed, it is possible that on seeing the documents the defendant may give in at once.

Notice may be
given by de-
fendant before
defence.

(*a*) *V. post*, p. 125; *Quilter v. Heatley*.

(*b*) *Fitzgerald v. Simpson*, 17 Ir. Ch. Rep. 141.

(*c*) *Belsham v. Harrison*, 15 L. J. Ch. 438.

(*d*) *Peyton v. Lambert*, 6 Ir. Ch. Rep. 9.

(*e*) See R. S. C. (costs) June, 1875, Ord. VI. (special allowances, &c.) r. 15.

(*f*) See *per* Erle, C. J., 8 C. B. N. S. 634; *per* Crompton, J., 3 E. & E. 608.

(*g*) *V. ante*, p. 15.

(*h*) *Quilter v. Heatley*, 48 L. T. 373 (disapproving of the *ratio decidendi* in *Webster v. Whewell*, 15 Ch. D. 120, though not of the decision itself).

(*i*) 31 W. R. 330 (*s.c.* 23 Ch. D. 42).

(*k*) R. 14.

CHAP. VII. At any rate it is sufficient ground for requiring to see them.
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Form of
notice.

that they have been made part of the statement of claim"; and Lindley, L. J., added, "There is a material distinction with regard to the stage at which it is obtainable, between ordinary discovery and the discovery of documents referred to in pleadings and affidavits. Such discovery is of right" (l).

The notice must be in writing (m), and a statutory form (n) is prescribed by the rules, but it is not necessary that it should be given in the very words of the form, provided that a sufficient description of the documents is given to enable the other party to know what documents are required to be produced (o). In ordinary cases inspection is only permitted to the party, his solicitor, and legal agents; if inspection by a special agent or witness is required, an order to that effect must be procured (p). No length of notice is fixed by the rules, and no time is specified in the statutory form within which the inspection may be required to be given, but it results from rule 16 (q), that either 5 or 7 days, as the case may be, is the *maximum* interval allowed between the receipt of the notice and the giving of the inspection. A notice to inspect on the following day has been considered too short (r).

Consequences
of not comply-
ing with notice
without suffi-
cient cause.

If the party to whom such notice has been given fails to comply with it by giving a counter-notice of the time at which the inspection may be had (s), he will not be allowed afterwards *to put any such document in evidence* on his behalf in the action or proceeding, unless he satisfies the Court that such document *relates only to his own title*, he being a *defendant* in an action, or that he had *some other sufficient cause* for not complying with the notice (t). By "title" is, apparently, meant the party's *title to relief or case generally* (u). It would be contrary to principle to make a defendant pro-

(l) *Ib.* 331. See, however, *Halliday v. Temple*, 8 De G. M. & G. 96; *Turner v. Burkinshaw*, 4 Giff. 399.

(m) *Sed quaere*, when the notice is given *at the hearing*.

(n) *V. post.* Append. p. 193.

(o) See *per Hall*, V.-C., 11 Ch. D. 260.

(p) *V. post.*, p. 142.

(q) *V. post.*, p. 126.

(r) See *In re Credit Co.*, 11 Ch. D. 256.

(s) *V. post.*, p. 126.

(t) R. 14. See, for an instance of the application of this part of the rule, *Anon.*, W. N. 1876, 40.

(u) *V. ante*, p. 33. It must be remembered that a plaintiff is in the position of a defendant *quod* counter-claim (see *per Field*, J., 5 Q. B. D. 147).

duce documents, which, though not muniments of title, are documents not in favour of the plaintiff but of the defendant, who is entitled to produce them for the first time in Court (x). If, however, the plaintiff had an interest in the document, he would have a right to inspect it (y). Upon the principle that *expressio unius exclusio est alterius*, a plaintiff would not be justified in refusing to produce documents by the fact that they related exclusively to his own title, e.g., were his title deeds, though there is some authority to the contrary; thus, in an anonymous case before Lindley, J., at chambers (z), an application by the executors of a deceased mortgagor, in an action of ejectment by the mortgagees, to inspect the mortgage deed, was refused, the plaintiff undertaking to give a statement of principal, interest, and costs due with particulars of subsequent incumbrances, the case being apparently decided in accordance with the ordinary rules of discovery, without any special reference to the rule (a). In *Webster v. Whewall* (b), which was an action of trespass, Denman, J., seems to have thought that the fact that the document pleaded was the plaintiff's title-deed, justified him in refusing to produce it for the defendant's inspection. The fact that the document was not in the possession or under the control of the party called upon to produce at the time of giving the notice, would be, of course, a sufficient excuse for not complying with it (c), and it is doubtful whether such possession or control is to be inferred, in the absence of any statement to the contrary, from the mere fact of such reference (d). In the analogous case of *profert*, it was excused where there was an impossibility or insuperable difficulty in the way of the production of the deed without any fault of the party pleading it (e). As above stated, the fact that the defendant has not yet put in his statement of defence is not only no excuse for not producing a document, but may, on the contrary, be a very strong reason for pro-

Want of
possession or
power over
document.

(x) *Per* Pollock, B., 7 Q. B. D. 407; see *per* Kindersley, V.-C., 4 Drew. 527; *Glover v. Hall*, 2 Phill. 484.

(y) *V. pos.*, p. 130, as to the meaning of the word "interest."

(z) *Anon.*, W. N. 1876, 23.

(a) *V. ante*, p. 33 (o); cf. *Howard v. Robinson*, 4 Drew. 522.

(b) 15 Ch. D. 120.

(c) *Hare*, 267; see *Fitzgerald v. Simpson*, 17 Ir. Ch. Rep. 141; *Philips v. Pennefather*, Ir. Rep. 3 Eq. 12; *Sooby v. Mercer*, 3 Jur. 949.

(d) See *per* Lord Eldon, L. C. 1 Swans. 122.

(e) See *per* Maule, J., 7 C. B. 378.

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Two courses
open to party
giving notice.

Counter-notice
by party re-
ferring.

Time within
which inspec-
tion to be
given.

ducing it, if the defendant requires to see it for the purpose of putting it in (*f*). As an alternative to excluding the document, the Court or presiding Judge might order the hearing of the proceedings to be postponed at the cost of the non-producing party, in order to give the opposite party an opportunity of enforcing production (*g*).

If the party who receives the notice omits in due time to give the counter-notice of a time for inspection, or (in his counter-notice) objects to give inspection of any of the specified documents, the party desiring it may apply for an *order for inspection* (*h*), and the burden of showing cause against the application lies upon the party who refuses production (*i*). Two courses, therefore, are, under the rules, open to the party giving the notice; (1) he may take no further action in the matter, and afterwards, at the trial or hearing, object, under this rule, to the document being received in evidence (as was done in *Webster v. Whewall*) (*k*); or (2) at once apply (under r. 18) to inspect it; but it seems from that case, that where the document withheld is a *material* one, the party requiring inspection should not wait until the trial, but apply for an order to inspect, as, otherwise, his conduct may be construed into an admission that he does not really stand in need of an inspection of it (*l*).

The counter-notice of the time during which the documents may be inspected (which must be a period of three days) must be given by the party receiving the notice within two days from such receipt, if all the documents referred to in the notice have already been set forth by him in an affidavit of documents, or within four days, if any of them have not been so set forth, and must fix a time within three days from the delivery thereof at which the documents, or such of them as the party giving the notice does not object

(*f*) *V. ante*, p. 123.

(*g*) See Ord. XXXVI. r. 21; Irish C. L. P. Act (16 & 17 Vict. c. 113), s. 64, and 30 & 31 Vict. c. 44, s. 109 (Irish Chancery Act).

(*h*) R. 17; *v. post*, p. 127. This course is inapplicable to the case of a notice being given *at the hearing*, when, as it seems, no order for inspection can be made (see *Dauvillier v. Myers*, 17 Ch. D. 346).

(*i*) *Quilter v. Heatley*, C. A., 48 L. T. 373.

(*k*) 20 Ch. D. 120.

(*l*) *Ib.*, *per* Denman, J. In this case, the plaintiff had actually tendered the deed for inspection after the defence was put in, but the defendant had refused to inspect it, insisting upon his right to exclude it from evidence (see the report in 42 L. T. 868), and the decision was approved of by the C. A. in a subsequent case (*v. p.* 123, *h*).

to produce, may be inspected at the office of his solicitor, and must state which documents (if any) he objects to produce and on what ground (*ll*). A form of counter-notice is provided by the rules, which may be used with such variations as circumstances may require (*m*). If the party served with the notice to produce objects (by his counter-notice) to give inspection of any of the documents, application must be made, in the ordinary way, for an order for their inspection (*n*). The Court has no power to enforce such inspection, other than by treating a refusal to allow it as a contempt of Court, *i.e.*, by attachment (*o*).

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Form of
counter-notice.

Application for
leave to inspect
where objec-
tion made.

SECT. 4.—*Production and inspection of documents.*

Application for the production and consequent inspection of documents may be made, either as following up the disclosure of documents generally by affidavit, or a notice to produce documents referred to in pleadings or affidavits (*q*), or as a substantive application in the first instance (*r*). A party in contempt is not thereby disabled from making it (*s*). There is no provision in the rules as to the stage at which the application may be made (*t*). In the Court of Chancery, the applicant was not, as a rule, prejudiced by *delay* in applying, though he was required to show that the inspection was *bond fide* sought for the purposes of the action (*u*).

Sect. 4.

Applications
for production
of documents.

Where the application is for the inspection of documents referred to in the pleadings or affidavits of the party from whom it is sought (*x*), or disclosed in his affidavit of documents, no affidavit in support is necessary (*y*), though there must be

Where docu-
ments referred
to in pleadings,
etc., or in
affidavit of
documents, no

(*ll*) Ord. XXXI. r. 16.

(*m*) *Ib.* See App. B. No. 11, *post*, p. 193. The case of a party suing in person has not been provided for by this rule as regards the *place of inspection*.

(*n*) Ord. XXXI. r. 17.

(*o*) *East Ind. Co. v. Kynaston*, 3 Bligh, 153, 163. It is doubtful whether rule 20 applies to such cases.

(*q*) *V. ante*, p. 122.

(*r*) Ord. XXXI. rs. 11, 18. A form of application is given in the Appendix, *post*, p. 196. See as to the costs of the application and inspection, *post*, p. 185.

(*s*) *V. ante*, p. 106.

(*t*) See upon this subject generally, *ante*, pp. 13, *seq.*

(*u*) Dan. 1678. See *Franco v. Meyer*, 2 H. & M. 42.

(*x*) *V. ante*, p. 122.

(*y*) This is in accordance with the former Chancery practice (see *Rochdale Canal Co. v. King*, 15 Beav. 11).

CHAP. VII. dispensing with such an affidavit in the Common Law
Sect. 4. Courts (*r*).

1. Documents must be described with reasonable certainty.

1. The documents sought to be produced should appear upon the notice of motion or summons, so that with *reasonable certainty* the Court may know what they are (*s*), and the description given should be such that it may be seen whether the applicant is entitled to inspect them or not (*t*), and sufficiently full to enable the Court, if necessary, to order their production (*u*). Where the documents in question are few, they may be conveniently described in the body of the affidavit, but where they are numerous, they may be set out in a schedule, and referred to accordingly (*x*).

2. Applicant must show interest in the documents.

2. The right to the production of documents is governed, generally speaking, by the same rules as regulate the right to other discovery (*a*), and according to the well-known rule the applicant must show that he has an *interest* in the documents of which he seeks inspection, that is, not necessarily an interest in the nature of property, or an interest in the popular and ordinary sense of the word, but that he is so far interested in them as to *stand in need of their production for the legitimate purposes of the litigation* in which he is involved (*b*). He must show that they are, or may be, *evidence which may prove, or lead to, or assist in proving his case* at the hearing of the cause. It must be shown that the document is of such a character that it will or may give a discovery of the case, or a portion of the case, without proof of which the plaintiff cannot have a decree (*c*). It is sufficient, however, if the matter suggested to be contained therein is such as may be rationally contended to support the applicant's case and impeach or weaken his opponent's, or such as his legal advisers may

(*r*) See *Christopherson v. Lotinga*, 15 C. B. N. S. 809; *Kingsford v. G. W. R.*, 16 *ib.* 761; *Herschfield v. Clark*, 11 Ex. 712.

(*s*) See *per* Stuart, V.-C., in *Piott v. Mullins*, 1 Sm. & Giff. 1, 3.

(*t*) See *Atkyns v. Wright*, 14 Ves. 213; *Piott v. Mullins*; *Hunt v. Hewitt*, 7 Ex. 236, 244.

(*u*) *V. ante*, p. 117.

(*x*) See *Cashir v. Craddock* (No. 1), 2 Ch. D. 140.

(*a*) Dan. 1674; *Swinburn v. Nelson*, 16 Beav. 416; *Clegg v. Edmundson*, 22 *ib.* 15; *per* Chitty, J., 47 L. T. 577.

(*b*) See *per* Wigram, V.-C., 8 Ha. 112, 3 *ib.* 637; pl. 295. A party is entitled to inspect documents though he does not admit their genuineness (*Benjamin v. Saulez*, Ir. R. 6 C. L. 16).

(*c*) *Ib.* Anciently, the plaintiff used to allege that "by the contents of the documents, &c., if produced, the truth of his case would appear."

by a reasonable possibility fairly so use (d); the party seeking for discovery is not bound to show that the documents will be conclusive in his favour; it is enough if they be relevant to support his case (e).

3. It is not sufficient to allege or suggest generally that the documents are in the other party's possession or power; the applicant must show with reasonable certainty that they are so (f) (though he is not bound to establish it "with the accuracy of mathematical demonstration") (g), e. g., an admission by his opponent to that effect. The affidavit ought to state, *not a mere suggestion*, but *circumstances sufficient to satisfy the Court or Judge, that there are in the possession, or under the control of the opposite party certain documents, and that those relate to such action or other legal proceeding*; a *prima facie* case, calling for an answer, must at least be stated in this respect (h).

The respondent may show cause against the application by affidavit swearing that he has no such documents in his possession or power (in the absence of which denial it will be assumed that they are) (i), or that they relate exclusively to his own case, or that he is for any other sufficient reason privileged from producing them (k); or he may submit to show parts, covering the remainder, on an affidavit that the part concealed does not in any way relate to the applicant's case (l), or is privileged; he is also at liberty (at his own costs) to relieve himself, if he can, from the consequences of an inadvertent previous admission of the possession of documents in his answer or affidavit of documents (m), or an omission to claim protection, and to make good insufficiently worded claims of privilege, or explain blunders in previous affidavits (n); he may also show, if such be the case, that he

3. That they are in respondent's possession or power.

Respondent may show cause by affidavit.

- (d) See *per* Knight-Bruce, V.-C., 1 Y. & C. Ch. 651—2, 14 W. R. 597.
- (e) See *per* Lord Campbell, C. J., 4 E. & B. 335; *per* Brett, L. J., 48 L. T. 23.
- (f) See *per* Cur. 7 Ex. 243. See *ante*, pp. 113, *seq.* as to when documents are deemed to be in a party's possession or power.
- (g) See *per* Monahan, C. J., Ir. R. 2 C. L. 504.
- (h) *Hunt v. Hewitt*, 7 Ex. 236, 243. See *Thompson v. Robson*, 2 H. & N. 412; *Houghton v. Lond. &c. Ass. Co.*, 17 C. B. N. S. 80; *Evans v. Lewis*, L. R. 1 C. P. 656 (decided upon s. 50 of the C. L. P. Act, 1854).
- (i) See *per* Brett, J., L. R. 10 C. P. 231.
- (k) See *Hunt v. Hewitt*, 7 Ex. 236, 244.
- (l) *Ib.*; *v. post*, p. 137.
- (m) *Hare*, 269; *Morrice v. Swaby*, 2 Beav. 500; *Llewellyn v. Badeley*, 1 Ha. 527. See as to the costs in such cases, *Smith v. Massie*, 4 Beav. 417; *Gardner v. Dangerfield*, 5 *ib.* 389.
- (n) See *Corporation of Hastings v. Ivall*, L. R. 8 Ch. App. 1017 (where

CHAP. VII. has *bond fide* parted with the documents since making his affidavit (o). The application may also be met by showing

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No discretion
as to granting
production.

that the question of the right to the inspection sought should be postponed or reserved until the determination of some principal issue or question on which the right depends, or that for some other reason it is desirable to do so until the determination of some other issue or question (p). But unless the party resisting production can bring himself within one of the recognised grounds of protection, *no discretion* can be exercised in the matter, and it is the *duty* of the Court to order production (q), the privilege from which, courts of equity have, for a long term of years, been strict in refusing to extend (r). It is no ground, therefore, for refusing production that the documents in question would not be admissible in evidence for the applicant (s), for everything which will throw light on the case is *prima facie* subject to inspection (t), or that they might prejudice the case of the producing party before the jury (u), or that they contain not facts but matters of opinion merely (x), or are private and confidential (y), or would disclose the trade secrets of the party producing, or the names of his customers (z), or are "privileged communications" in the sense familiar in actions for defamation (a).

What is possession or power for purpose of production.

The question of when documents are to be deemed to be in a party's possession or power for the purpose of discovery of their existence and description has already been discussed (b); it now remains to be considered in what cases they

three successive affidavits of documents were made and a fourth ordered, to make good, if possible, the claims of privilege), and *Lloyd v. Purves* (No. 2) 6 W. R. 507.

(o) *V. post*, p. 135.

(p) Ord. XXXI. r. 19. See "Postponing discovery," *ante*, pp. 26 *seq.*

(q) *Bustros v. White*, C.A., 1 Q. B. D. 423; see *per* Cotton, L. J. 5 Ex. D. 113. A similar construction was put upon s. 18 of the Chancery Procedure Act from which r. 11 was copied (*ib.*). See, however, the judgments of the C.A. in *Bewicke v. Graham*, 7 *ib.* 400, 409.

(r) See *per* Cotton, L. J., 5 Ex. D. 114.

(s) *Per* Jessel, M. R., 1 Q. B. D. 425; *per* Wood, V.-C., 2 H. & M. 593.

(t) *Hutchinson v. Glover*, 1 Q. B. D. 138.

(u) *Bustros v. White*, C.A., *ib.* 423.

(x) *Ib.*

(y) *M'Corquodale v. Bell*, 1 C. P. D. 471; *Tipping v. Coates*, 6 Ha. 16.

(z) *Howe v. M'Kernan*, 30 Beav. 547; *Telford v. Ruskin*, 1 Dr. & Sm. 148; *Renard v. Levinstein*, 3 N. R. 665; see however, *Moore v. Craven*, L. R. 7 Ch. App. 94 n.; *Carver v. Pinto Leite*, *ib.* 90, as to postponing discovery of such matters, *and post*, pp. 172, *seq.*

(a) *Webb v. East*, C.A., 5 Ex. D. 103; *Black v. Holmes, Fox & Sm.* 28.

(b) *V. ante*, p. 113 *seq.*

will be deemed to be so for the purpose of producing them for inspection. When possession for the purpose of production is spoken of, that is to say, a right and power to deal with it, *actual corporeal possession is not meant, but legal possession in respect of which the party is authorised to deal with the property in question (c)*, and, similarly, by "power" is meant a *legal control over the document (d)*; moreover, the admission must be one of *exclusive possession* or power, for the rule of the Court, adopted from necessity, with reference to the production of documents, is that if a defendant has a *joint possession of the document with somebody else who is not before the Court [either actually or by representation] (e)*, the Court will not order him to produce it, and that for two reasons; one is, that a party will not be ordered to do that which he cannot or may not be able to do; the other is, that another party, not present, has an *interest (f) in the document which the Court cannot deal with (g)*. Thus, a party will not, in the absence of such other persons, be ordered to produce documents in the joint possession of himself and his co-partners (h), or co-trustees (i), or in possession of himself on behalf of self and partners (k), or of an agent on behalf of him and his partners or fellow-tenants in common (l). In such cases it is the duty of the party resisting production to satisfy the Court as to the existence and *nature of such joint ownership (m)*, but he need not go on to show that he has actually applied to the other joint-owners, and that they have

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Possession
must be legal.

And exclusive.

Affidavit must
show nature of
joint owner-
ship.

(c) *Per* Lord Cottenham, L. C., in *Reid v. Langlois*, 1 Macn. & G. 627, 636; see *Penney v. Goode*, 22 L. J. Ch. 371, 1 Drew. 474.

(d) *Ib.*; see *Taylor v. Rundell*, 1 Phill. 222; *Palmer v. Wright*, 10 Beav. 234.

(e) See *Glyn v. Caulfield*, 3 Macn. & G. 463; *Richardson v. Hastings*, 7 Beav. 354; *Gaskell v. Chambers*, 28 L. J. Ch. 388; *Phillips v. Halmer*, 15 W. R. 578.

(f) *i.e.* an interest in the nature of *property*.

(g) *Per* Lord Cottenham, L. C. Cr. & Ph. 111; *Murray v. Walter*, *ib.* 114; *Reid v. Langlois*, 1 Macn. & G. 627; *Lopez v. Deacon*, 6 Beav. 254; *Glyn v. Caulfield*; *Penney v. Goode*, *supra*; *Kettlewell v. Barstow*, L. R. 7 Ch. App. 686, 693; *Hadley v. M'Dougall*, *ib.* 312; *Kearsley v. Philips*, 10 Q. B. D. 36, 465, C. A., (where all the cases are reviewed).

(h) *Hadley v. M'Dougall*; *Penney v. Goode*, *ubi supra*.

(i) *Kearsley v. Philips*, *ubi supra*.

(k) *Reid v. Langlois*; *Murray v. Walter*; *Lopez v. Deacon*.

(l) *Edmunds v. Lord Foley* (No. 2), 30 Beav. 282; *Airey v. Hall*, 2 De G. & Sm. 489.

(m) *Bovill v. Cowan*, L. R. 5 Ch. App. 495; *Hutchinson v. Glover*, 1 Q. B. D. 138; *Kearsley v. Philips*, *supra*.

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Applicant can
interrogate as
to contents,
or bring all
parties before
the court.

No excuse that
documents are
in hands of
agent under
lien.

refused to consent to the production, or that by reason of such refusal it is physically impossible for him to produce the documents (*n*). Where production is withheld upon this ground, the party seeking the discovery can obtain his object either by making the person interested in the document a party (if that be possible) (*nn*) or by interrogating the opposite party as to the contents of the documents (*o*), and getting production of the originals at the hearing by means of a *subpoena duces tecum* (*p*). It should be observed that trustees and other persons in a fiduciary position, although legally in possession of documents relating to the trust, will not be allowed to produce them in the absence and to the prejudice of their *cestuis que trustent* (*q*). It is no ground for resisting production that a person not before the Court has an *interest* in the documents short of a *joint property* (*r*); thus, a mortgagee cannot object to produce the title-deeds of the mortgaged property on the ground of the interest therein of the mortgagor (*s*).

That a third person has a *lien* upon the documents as against the party called upon to produce, *e.g.*, as his solicitor or agent, is not a sufficient reason for not ordering him to produce them, even when a bankrupt (*t*), as he may be able to pay whatever is due upon them, if necessary, and free them from the lien (*u*); but it is usual in such cases to reserve to the party liberty to apply for an extension of time to enable him to procure the documents for production (*x*), or for a discharge of the order in case he finds it impossible

(*n*) *Kearsley v. Philips*, 10 Q. B. D. 36, 465 (C. A.), explaining *Hutchinson v. Glover*, *ib.* 138; *Murray v. Walter*, Cr. & Ph. 114. In the case of answers it is otherwise (*ante*, p. 93).

(*nn*) See *Bugden v. Tylee*, 21 Beav. 545.

(*o*) *Hooper v. Gumm*, 2 J. & H. 602, 605; *Lord Eglington v. Lamb*, 35 L. J. Ch. 113.

(*p*) Dan. 1684; *Hadley v. M'Dougall*, L. R. 7 Ch. App. 312; *Richards v. Watkins*, 6 Jur. N. S. 168; see *per* Jessel, M. R. 45 L. T. 361.

(*q*) *Ford v. Dolphin*, 1 Dr. 222; see *King of Two Sicilies v. Wilcox*, 1 Sim. N. S. 331.

(*r*) See *Kettlewell v. Barstow*, L. R. 7 Ch. App. 686; *Hutchinson v. Glover*; W. pl. 327.

(*s*) *Gough v. Offley*, 5 De G. & Sm. 653.

(*t*) See *Vale v. Oppert*, L. R. 10 Ch. App. 340; see, however, *Bainbridge v. Blair*, 1 Jur. 256.

(*u*) *Ex parte Shaw*, Jacobs, 270; *Vale v. Oppert*; see *Re Toleman*, 13 Ch. D. 885. See, however, *Wroughton v. Barclay*, 11 Jur. 274. It seems that the party's solicitor cannot set up a *lien acquired in the cause* as against the right of the other parties to production (see *per* James, L. J., in *Vale v. Oppert*, *supra*; *Ley v. Barlow*, 1 Ex. 800; *Hope v. Liddell*, 7 De G. M. & G. 331).

(*x*) *Goodchap v. Wearing*, 16 Jur. 586.

to do so (*y*), for the Court will not send a man to prison for not doing that which he is satisfactorily shown not to be in a position to do (*z*). A mere formal application, however, is not sufficient; he must satisfy the Court that he has done his best to comply with the order (*a*).

Where the documents have been *bond fide mortgaged or pledged* previously to, or even, it seems, since the action (*b*), so as to part with the property in them, an order for production will not be made, as the party cannot be ordered to pay off the mortgage or discharge the pledge (*c*); and the fact that documents were detained by counsel as security for fees, or by law stationers for their charges, has been held to be a sufficient answer to an application for an attachment for not delivering them up (*d*).

A party is not bound for the purpose of producing documents, to enforce at his own expense a covenant by a third person for their production (*e*). An undertaking given to a third party *not to part with the possession of documents* does not entitle the party who has given such undertaking to refuse production of them (the possession of the Court being equivalent to that of the party producing) (*f*), nor does the fact that the documents were compulsorily obtained by an order of the Court from parties to a previous suit (*g*); but where a document is obtained not for unlimited publication and use, but in confidence for a limited and restricted purpose, *e.g.*, assisting a common claim or defence, the Court will not order production of it, as it would be a manifest breach of faith towards the person who voluntarily entrusted the party with it (*h*). A claim of *lien* upon documents by an agent cannot be set up as a reason for refusing inspection in

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Secus, where property in them parted with.

Production not ordered where breach of faith with third party.

Lien as against applicant no excuse.

(*y*) See *Vale v. Oppert*, L. R. 10 Ch. App. 340; *Liddell v. Norton*, Kay, App. XI.; *Monsel v. Lindsay*, 13 Ir. Eq. R. 144.

(*z*) See *Ellwood v. M'Donnell*, 8 Beav. 14; *Burbidge v. Robinson*, 2 Macn. & G. 244; *per* Turner, L. J., 9 W. R. 393.

(*a*) See *per* James, L. J., L. R. 10 Ch. App. 342.

(*b*) *Burbidge v. Robinson*, 2 Macn. & G. 244; see, however, *Bainbridge v. Blair*, 1 Jur. 256.

(*c*) *Liddell v. Norton*, *supra*; *Palmer v. Wright*, 10 Beav. 234; *Kettlewell v. Barstow* (No. 2), W. N. 1872, 95.

(*d*) *Re Williams*, 3 De G. F. & J. 304; see *North v. Huber*, 29 Beav. 437.

(*e*) *Bethell v. Casson*, 1 H. & M. 806; *cf. Enthoven v. Cobb*, 2 De G. M. & G. 635, 5 De G. & Sm. 595; *Vivian v. Little*, LXXV. L. T. 108.

(*f*) *Penkethman v. White*, 2 W. R. 380; see *per* Cairns, L. J., L. R. 2 Ch. App. 448.

(*g*) See *per* Wood, V.-C., in *Reynolds v. Godlee*, 4 K. & J. 88, 91.

(*h*) See *Enthoven v. Cobb*; *Bethell v. Casson*, *supra*.

CHAP. VII. an action by the principal for their recovery (i), and the
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Or agreement
 not to inspect.

ordinary lien of a solicitor upon documents does not entitle him to refuse inspection of them even to the party against whom or his predecessors in title he claims it, for the lien does not deprive the client of his right, and is not lost by the production (k). In one such case, permission to take copies was refused (l), but in a recent case Vice-Chancellor Bacon declined to so limit the order on the ground that the right to take copies was incident to the right to inspect (m). The inspection may, however, be ordered to take place at the premises of the producing party (n). A covenant or agreement by the shareholder or member of a company that he shall not be at liberty to inspect the company's books has been held not to preclude him from obtaining the ordinary production of them in an action between himself and the company (o), and, similarly, the usual "secrecy clause" does not debar a shareholder and contributory of a company in course of winding up from inspection of the books of the company when sought *bond fide* (p); but it seems that, in such a case, if the applicant's right or title to the relief claimed had been denied, the inspection should, at least, be postponed until after the hearing (q); and, generally, where a party claims the benefit of an agreement or sets it up, he will not be permitted to ask for a discovery which would lead to a violation of one of its principal provisions (r). It is no answer to a claim of privilege for documents, to show that it has been waived on a previous occasion (s), and, as a general rule, the party cannot be compelled to disclose their contents in answer to interrogatories (t), though secondary evidence may be given

(i) *Lord Brougham v. Cauvin*, 18 L. T. 281.

(k) *Pratt v. P.*, 51 L. J. Ch. 838; *Balch v. Symes*, T. & R. 87.

(l) *Lochett v. Cary*, 3 N. R. 405.

(m) *Pratt v. P.*, *supra*.

(n) *Lochett v. Cary*, *supra*.

(o) *Hall v. Connell*, 3 Y. & Coll. 707. See, however, *Turney v. Bayley*, 4 De G. J. & S. 332. In an action against an Insurance Company by one of the shareholders, production was ordered of such documents only as the defendants were, under their deed of settlement, bound to produce to shareholders (*Williams v. Prince of Wales Ins. Co.*, 23 Beav. 338).

(p) *Re Birmingham Banking Co.*, 15 L. T. 203.

(q) *Turney v. Bayley*, *supra*.

(r) See *per* Lord Langdale, M. R., 2 Keen, 587.

(s) *Underwood v. Secretary for India*, 35 L. J. Ch. 345.

(t) *Latimer v. Neate*, 4 Cl. & Fin. 570, 584.

of them (*u*), where the disclosure would not be contrary to public policy (*x*). CHAP. VII.
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Where protection is claimed for certain portions of documents or books, on the ground that such portions contain only irrelevant or privileged matter (such as ledgers, account-books, or letter-books, containing a variety of matters some of which may relate to the action, and others not), the producing party must apply by summons at chambers (*y*) upon affidavit to that effect, for leave to *seal or cover up* such portions (*z*), or liberty to seal up such parts of the documents as shall be produced as are not relevant may be reserved in the original order for the affidavit or for production (*a*). This privilege will not be allowed, however, where the document is one, entire and indivisible (*b*), or where the disclosed parts would be unintelligible without reference to the parts sought to be concealed, as in the case of an agreement containing several clauses (*c*), and it is in no case permissible to mutilate the documents or remove the parts claimed to be protected instead of sealing them up (*d*). If a party imprudently mixes privileged with non-privileged matter in the same documents for his own convenience, so as not to be separable, he must submit to produce the entire documents (*e*), but it is otherwise where this has been done by another person in the ordinary course of business, even though in his employment (*f*). Where the documents are private and confidential, and the writer is shown to object to their being made public, the Court may require from the inspecting party an undertaking (which may be made part of the terms of the order for inspection) not to use them for any collateral purpose (*g*), and, generally, where the consequences of doing

Privileged parts may be sealed up.

Secus, where document entire and indivisible.

Undertaking not to publish contents may be required.

(*u*) See *Phelps v. Prew*, 3 E. & B. 430.

(*x*) *V. ante*, p. 66.

(*y*) Dan. 1681—2; Seton, 155—6. A form of summons is given in the Appendix, *post*, p. 198.

(*z*) In such a case the party will not be required to pay the costs of his summons (*Talbot v. Marshfield*, L. R. 1 Eq. 6).

(*a*) See *Curd v. C.*, 1 Ha. 274; see 8 Ha. 120, for an order for production of deeds with liberty to conceal contents except as to *parcels*.

(*b*) See *Kettlewell v. Barstow*, L. R. 7 Ch. App. 686.

(*c*) *Luscombe v. Steer*, 37 L. J. Ch. 119.

(*d*) *Ayres v. Levy*, 19 L. T. 8.

(*e*) *Carew v. White*, 5 Beav. 172; *Freeman v. Fairlie*, 3 Mer. 24, 43.

(*f*) *Airey v. Hall*, 2 De G. & Sm. 489.

(*g*) *Hopkinson v. Lord Burghley*, L. R. 2 Ch. App. 447; *Mahony v. Widows Life Ass. Fund*, *ib.* 6 C. P. 252; *cf. Whitaker v. Izod*, 2 Taunt. 115. In the Common Law Courts, inspection has been ordered in the presence of a Master (*post*, p. 144 *e*).

CHAP. VII. so would be mischievous, a party will be prohibited from
Sect. 4. publishing information which he may obtain from the documents (*h*).

Judge may
decide question
of privilege by
consent.

As it is often difficult, on the materials before a Judge, to determine whether particular documents are privileged or not, a convenient course is often pursued at chambers, of producing the documents for his inspection (*i*), which can only be done by consent, as the other party does not see the documents, and the Judge cannot act on *ex parte* evidence without consent (*k*). Where this course has been taken by a Judge, no appeal lies from his decision (*l*).

Time for
producing.

It seems to have been considered, in the Court of Chancery, that a party was not bound to incur costs in obtaining production of documents, or in order to facilitate their production (*m*). In one case, the applicant was ordered to pre-pay the expense of transmitting the documents to this country (*n*). The time to be allowed for production in each individual case will, of course, depend upon the situation of the documents and other circumstances affecting them (*o*); where they are shown to be abroad, the Court will order them to be produced within a reasonable time, and if that is not done, the consequences will be the same as if the party had had them here in the first instance and refused to produce them (*p*). The statutory form of order directs the production to be made (at the office of the solicitor of the producing party) "at all seasonable times on reasonable notice" (*q*), and, in the Chancery division, may further direct them to be produced "at any examination of witnesses and at the hearing of the action" (*r*). It is not the practice to limit the time during which documents are to be produced (*s*).

Form of order.

(*h*) See *Drake v. Symes*, Johns, 647, 650 (books of an Insurance Company); *Reynolds v. Godlee*, 4 K. & J. 88.

(*i*) See *per* Wood, V.-C., 27 L. J. Ch. 28 (where it is said to be the right and proper course in such cases); *Ponsonby v. Hartley*, C. A., W. N. 1883, 44.

(*k*) See *per* Blackburn, J., L. R. 7 Q. B. 772.

(*l*) See *Bustros v. White*, C. A. 1 Q. B. D. 423.

(*m*) See *Bethell v. Casson*, 1 Hem. & M. 808; *Vivian v. Little*, LXXV. L. T. 108.

(*n*) *Lindsay v. Gladstone*, L. R. 9 Eq. 182.

(*o*) In the Court of Chancery, seven days after making the affidavit of documents was the ordinary time allowance for production (Seton, vol. I. p. 133).

(*p*) *Farguharson v. Balfour*, 1 T. & R. 184, 190.

(*q*) Rs. April, 1880, Form H. 16; *v. post*, App. p. 196.

(*r*) See as to the purposes for which documents may be ordered to be produced, *Taylor v. Sheppard*, 1 Y. & C. 280, 284 n.

(*s*) *A.-G. v. Brougham*, 9 Beav. 159.

Where an order for the production of documents is appealed from, the party may be restrained from inspecting them pending the appeal (*t*). The Court, in such cases must consider to what extent the party will really be prejudiced by giving the discovery sought, and how far, upon the merits, the appeal is likely to succeed (*u*).

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Production
suspended
pending
appeal.

SECT. 5.—*Practice as to inspection of Documents.*

It is the practice of the Court so to regulate orders for the production of documents as to prevent any damage arising to the producing party, and it is for this reason that no orders are more under the discretion of the Court (*x*). According to the practice of the Court of Chancery, the inspecting party was, in strictness, entitled to have the documents of which production was ordered deposited at the Record and Writ Clerk's Office (*y*) (now transferred to the Central Office of the Royal Courts), though it afterwards grew to be the practice, as a matter of *indulgence* and *convenience* to the producing party, to allow them to be produced at the office of his solicitor. In the Common Law Courts, on the other hand, it was not the practice to order deposit of documents in any office of the Courts, there being in fact no such office where they could be deposited, and therefore production was always ordered to be made at the office of the producing party's solicitor or agent (*z*).

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Place of inspection.

The Judicature Acts contain no express provision upon the subject, but seem to contemplate inspection being had at the London solicitor's office as a general rule (*a*), though documents

Office of producing party's solicitor or town agent.

(*t*) *Kelly v. Hatton*, 15 W. R. 916; *Combe v. Corporation of London*, 1 Y. & C. Ch. 631; *Stainton v. Chadwick*, 3 Macn. & G. 348; *Flower v. Lloyd*, XX. S. J. 584; *contra*, *Murray v. Clayton*, L. R. 15 Eq. 115. See Ord. LVIII. r. 16.

(*u*) See *per* Wigram, V.-C., in *Drake v. D.*, 3 Ha. 523, 529.

(*x*) See *per* Lord Cottenham, L. C. 1 Macn. & G. 532; *per* Wood, V.-C., 1 J. & H. 386; *Bustros v. E.*, 30 W. R. 374.

(*y*) See Consol. Ord. XLII. r. 3, and as to the mode of deposit, Dan. 1698 (*b*).

(*z*) See *per* Jessel, M. R., in *Brown v. Sewell*, C. A. 16 Ch. D. 517, 518, *seq.*, and Dan. 1696. In *Roberts v. Lloyd* (7 L. J. Ch. 115), this permission was given to save expense, the applicant being a pauper.

(*a*) See Ord. XXXI. r. 16, and the statutory form of order for production (*App. post*, p. 196); *Prestney v. Mayor, &c. of Colchester*, 52 L. J. Ch. 346.

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Now that a central office has been established for the Supreme Court it is desirable that the practice in all the divisions of the High Court should be made uniform as to the place of production (c). In actions proceeding in a district registry production may be ordered to be made at the office of the District Registrar (d). Documents in a foreign country may be ordered to be brought over to this country for inspection, or to be produced at their place of deposit as the justice of the case may require (e); in the former case the applicant for inspection may be ordered to prepay the costs of transmission (f).

Production at
place where
documents
used or kept.

Where the documents are very numerous, or are shown to be in constant use in the *trade or business* of the producing party, so that they cannot be removed without inconvenience, it is a matter of course to allow the production to be made at the party's own premises (ff), on an affidavit showing (1) that the documents relate not only to the matters in dispute but also to other matters unconnected therewith, and (2) are in constant use in the party's business, so that (3) they cannot be removed without great inconvenience (g). If the other party does not obtain a satisfactory inspection of them there, it is open to him to apply for an order that they may be deposited in Court (h). An order for production at the premises of one of the parties cannot be made without the consent of that party, for the Court cannot order that the other party shall be at liberty to enter his premises (i). A party will not be prejudiced in an application that the inspection may take place at his own premises by having in the first instance, before he discovered the incon-

(b) See *Abud v. Riches*, 2 Ch. D. 528.

(c) *Per* Jessel, M. R., 16 Ch. D. 519; *per* Lush, L. J., *ib.* 521. The difference in the practice of the Courts as to the place of production gave rise to a difference in the practice as to the allowance of costs of production and inspection (*v. post*, p. 185).

(d) Jud. Act, 1873, s. 66.

(e) See *Bustros v. B.*, C. A. 30 W. R. 374.

(f) *V. ante*, p. 138 (n).

(ff) *Mertens v. Haigh* (No. 1), Johns. 735; *Grane v. Cooper*, 4 Myl. & Cr. 263; *Hooper v. Gumm*, 2 J. & H. 602; *A. G. v. Whitwood Local Board*, 40 L. J. Ch. 592; *Carew v. Davies*, 21 Beav. 213; *Little v. Kirkwood*, L. R. (Ir.) 9 Eq. 325; *Prestney v. Mayor of Colchester*, 52 L. J. Ch. 346.

(g) See the form in *Reid v. Langlois* (1 Macn. & G. 628), pronounced to be the proper form by Wood, V.-C. (2 J. & H. 608). A form of summons is given in the Appendix, *post*, p. 199.

(h) See *Re Clements*, 46 L. J. Ch. 375.

(i) *Maund v. Allie*, 4 Myl. & Cr. 503.

venience of it, submitted to production at the solicitor's office, which is rather a proof of his *bona fides* than otherwise (*k*); but this indulgence will not be allowed where there is no business being carried on to which the documents relate (*l*), or where there are grounds for suspecting fraud or tampering with them (*m*).

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The Court has, on the other hand, power to remove documents out of the custody of the party in whose possession they are disclosed to be into its own (*n*), but in the Court of Chancery it was not the practice to change the possession of the documents unless some special grounds were shown for doing so (*o*), (the object of ordering production being to insure the inspection of documents, not their safe custody (*p*)), e.g., where there was reason to suspect their genuineness, and it was desirable to have them examined or tested by experts (*q*), or reason to believe that they would not be produced at the hearing, and, *à fortiori*, the Court would not deprive a party of the possession of a document representing a sum of money, e.g. a deposit receipt (*r*). Whatever be the place directed for the production, the Court of Appeal will not interfere with the decision of the judge of first instance in this respect, it being peculiarly a *matter of pure discretion* (*s*). Where deeds or other documents are ordered to be deposited, they must be left in the Central office (formerly in the Record and Writ Clerk's office), and are subject to such directions as may be given for their production (*t*); the Court considers that the person depositing documents has the right to the possession of them, and the custody of the Court is that of the person making the deposit (*u*), but, according to the practice of the Court of Chancery, inspection was refused to any person representing himself to be the

Deposit in court ordered under special circumstances.

Central office.

(*k*) See *per Wood*, V.-C., 1 J. & H. 388.

(*l*) *A. G. v. Whitwood Local Board*, 40 L. J. Ch. 592; but see *Prostney v. Mayor of Colchester* (muniments of corporation), 52 *ib.* 346.

(*m*) See *Mertens v. Haigh* (No. 1), John. 735.

(*n*) See Ord. XXXI. r. 11, and 15 & 16 Vict., c. 86, ss. 18; 20.

(*o*) Dan. 1696. See *Lafone v. Falkland Islands* (No. 2), 4 K. & J. 39, where the Court refused to allow original documents to be taken out of the jurisdiction, no special case for so doing being made out.

(*p*) See *Dunn v. D.*, 3 Drew. 17; *Jones v. Thomas*, 2 Y. & C. 312.

(*q*) *Blakesley v. Pegg*, 20 L. T. 51; *Twentyman v. Barnes*, 2 De G. & Sm. 225.

(*r*) *Mayor of Berwick v. Murray*, 1 Phill. 530; 1 H. & T. 452.

(*s*) *Bustros v. B.*, C. A., 30 W. R. 374; *v. ante*, p. 139.

(*t*) Chanc. Cons. Ord. XLII. r. 3. See Dan. 1696.

(*u*) *Per Romilly*, M. R., 21 Beav. 213.

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plaintiff or defendant or party by whom the documents were left, unless introduced by his solicitor or solicitor's clerk (x). The depositing party has a right to have them back again (for which purpose an order is necessary) (y), after the required discovery has been given, subject to the right of the Court to retain them, if it sees that they may be further required in the course of the action or at the hearing (z); in one case documents were retained in Court to see whether criminal proceedings would be taken upon them against the producing party (a).

Who may inspect.

Solicitors and agents.

Meaning of "agents."

The common form of order to produce directs production to the party, his "*solicitors and agents*," (and an undertaking to produce is construed as being so extended, unless it be otherwise specially provided (b), meaning by "*solicitors*," the *solicitors employed by the party in the action*, and by "*agents*," not necessarily *legal agents* only or the agents of the solicitor, but *general agents*, or persons in some way connected with the proceedings, e.g., a managing clerk of the party (c), and not *special agents appointed for the particular purpose of inspecting the documents* (d). Thus, a defendant is not entitled to inspect a co-defendant's documents as an "*agent*" of the plaintiff (e), nor is a mere relation of the party entitled to inspect such an "*agent*" (f). There may be personal reasons peculiar to the individual selected to inspect, e.g., connection with a rival establishment, which render him an improper person for the purpose (g); but it is no objection *per se* that such agent is also an intended witness in the action (h), or that he is not the sole agent of the inspecting party, for there is no rule that a party can only have one agent (i), and the agent who has the conduct of the action may have inspec-

(x) Braith. Pr. 509.

(y) *Runnall v. Yarroll*, 1 W. R. 442. V. post, App. p. 199.

(z) *Dunn v. D.*, 3 Drew. 17; 7 De G. M. & G. 25; see *Plunkett v. Lewis*, 6 Ha. 65.

(a) *Walker v. Cooke*, 3 Y. & C. 277.

(b) *Williams v. Prince of Wales Ins. Co.*, 23 Beav. 338.

(c) *Per Wood*, V.-C., 1 J. & H. 386.

(d) See *per Turner*, L. J., in *Draper v. Manch., &c. Ry. Co.*, 3 De G. F. & J. 23, 27.

(e) *Bartley v. B.*, 1 Drew. 233.

(f) *Summerfield v. Pritchard*, 17 Beav. 9.

(g) V. post, p. 176 (rr); *Brown v. Perkins*, 2 Ha. 540.

(h) *Per Turner*, L. J., *ubi supra*.

(i) *Republic of Costa Rica v. Erlanger* (No. 2), 44 L. J. Ch. 402.

tion, although another person is named in the pleadings as the agent of the party in this country (*k*). CHAP. VII.
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Where it is desired to have inspection by an agent especially appointed for that purpose, an authorisation to that effect must be inserted in the order or applied for subsequently (*l*), and it will only be granted under special circumstances (*m*). Thus, although the number and bulk of the documents might not perhaps alone be a sufficient reason, yet where there was the additional circumstance that the inspecting parties were foreigners, and the only alternative would have been to bespeak copies of all the documents, relevant or irrelevant, which would have been oppressive towards the inspecting parties, inspection by a professional accountant was allowed (*n*); and in like manner inspection has been ordered by engineers, surveyors, and other experts, in cases where the inspection would have conveyed little or no information to an ordinary person (*o*), *e.g.*, where the documents were in a foreign language (*p*), or accounts had been kept in a foreign currency (*q*); but it seems that this will not be done in a case where taking copies of the documents to be laid before an accountant or other skilled person would be sufficient, and it would not be oppressive to compel the party to do so (*r*), and where the accounts are only common money accounts, inspection by a professional accountant is unnecessary (*s*). Inspection by
special agents.

Accountants
and other
experts.

The inspection may be ordered to be made "by a person to be agreed upon by the parties, or, if not agreed upon, then by a person to be appointed by the master," for it would be unreasonable for one party to send down an accountant or other nominee of his own to inspect the other party's books without giving him an opportunity of objecting to the person who might be sent (*t*). Court may
select person
to inspect.

Where a *prima facie* case has been made out for im- Inspection by
witnesses.

(*k*) *Ib.*

(*l*) *A.-G. v. Whitwood Local Board*, 40 L. J. Ch. 592.]

(*m*) *Rep. Costa Rica v. Erlanger* (No. 2), 44 *ib.* 402.

(*n*) *Bonnardet v. Taylor*, 1 J. & H. 383; *Lindsay v. Gladstone*, L. R. 9 Eq. 132; *Coleman v. West Hart. Ry. Co.*, 4 L. T. 467.

(*o*) *Swansea Ry. Co. v. Budd*, L. R. 2 Eq. 274; *Blair v. Massey*, Ir. R. 5 Eq. 623.

(*p*) See *per Wood*, V.-C., L. R. 2 Eq. 275; *Bonnardet v. Taylor*, *supra*.

(*q*) *Lindsay v. Gladstone*, *supra*.

(*r*) *A.-G. v. Whitwood Local Board*; *Bonnardet v. Taylor*, *supra*. See, as to the costs of such inspection, *post*, p. 186.

(*s*) *Per Wood*, V.-C., 12 Jur. N. S. 561.

(*t*) *Head v. Willey*, XXV. Sol. Journ. 943; *v. post*, p. 150.

CHAP. VII. peaching the genuineness of documents, intended witnesses
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Mode of conducting the inspection.

No fee chargeable.

Taking copies.

have been allowed to inspect them (*u*), or even to test and examine them by chemical process (*x*), but not in a case where their genuineness was not impeached by the pleadings, and upon the ordinary affidavit that it was necessary to the applicant's case that they should be so produced (*y*). In such a case it seems that the names and addresses of the witnesses should be given, and that the solicitors on both sides should be present at the inspection (*z*). Special agents should be accompanied by the applicant's solicitor or a duly authorised clerk of such solicitor when making the inspection (*a*), but the producing party cannot insist upon the party himself being accompanied on the inspection by his solicitor, or a clerk, though he may have as many persons as he pleases present on his own behalf (*b*). The solicitor of the producing party, or some person on his behalf, has a right to be present at the inspection (*c*), which should be conducted in a peaceable and decorous manner (*d*), and may, if thought desirable, be conducted in the presence of an officer of the Court (*e*). Obstruction to the inspection by duly authorised persons is a contempt of Court, and may be punished by attachment (*f*). The inspecting party may be required to give an undertaking not to make public the information so obtained by him (*g*). No fee can in any case be charged for an inspection under the order of the Court, although it might have been, if such an inspection had been made independently of the action, *e.g.* by the steward of a manor for the inspection of the Court rolls in his possession as such (*h*). The common form of order for inspection provides for the making copies or extracts of

(*u*) See *Groves v. G.*, Kay, App. xix., and cases cited in L. R. 5 Eq. 291.

(*x*) See *Twentymann v. Barnes*, 2 De G. & Sm. 225. An authorisation to this effect must be inserted in the order.

(*y*) *Boyd v. Petrie*, L. R. 3 Ch. App. 818.

(*z*) *Groves v. G.*, *supra*.

(*a*) *Lindsay v. Gladstone*, L. R. 9 Eq. 132. It has been held that a Defendant is entitled to refuse to allow the inspection by a Plaintiff to take place in the presence of a co-defendant, though employed as an agent by the Plaintiff (*Bartley v. B.*, 1 Drew. 233).

(*b*) *Oldrieve v. Knowles*, xxv. Sol. Journ. 450.

(*c*) *Per Wood*, V.-C., Kay App. xx.

(*d*) *Williams v. Prince of Wales Co.*, 23 Beav. 338.

(*e*) See *Hill v. Phelps*, 21 L. J. Ex. 84 n. (*b*).

(*f*) See *re Clements*, 46 L. J. Ch. 375.

(*g*) *Williams v. Prince of Wales Co.*, 23 Beav. 338.

(*h*) *Hoare v. Wilson*, L. R. 4 Eq. 1.

the documents inspected by the inspecting party at his own expense (*i*), and, even in the absence of such a provision, there is an *implied* right to do so (*k*), though the usual practice is to take the copies from the solicitor of the producing party, who is bound to supply them on the written request of the inspecting party, at the rate of 4*d.* per folio; if he refuses or neglects to do so, the solicitor requiring the copy or extract is entitled to make it himself, and the other party's solicitor is then not entitled to any fee in respect thereof (*l*). In a case where much depended upon the precise form of the documents, fac-simile copies were, by special leave, authorised to be taken by photograph or otherwise (*m*).

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(*i*) See Rs. April, 1880, H. 16.

(*k*) *V. ante*, p. 136 (*m*).

(*l*) Rs. S. C. (costs) June, 1875, r. 16.

(*m*) *Favey v. Pemberton*, 11 C. B. N. S. 628; *Neilson v. Underwood* (No. 1), 1r. Rep. 4 Eq. 59; see *Singer Co. v. Wilson*, 11 L. T. 670; 12 *ib.* 140.

CHAPTER VIII.

INSPECTION OF PROPERTY.

CHAP. VIII. UPON the application of any party to an action, an order may be made, upon such terms as may seem just, for the *inspection (a) of any property* (including both *real and personal* corporeal property) which is the subject of such action (b). By "subject" is meant "*subject-matter*" (c), *i.e.*, property in respect of which, or some right or injury connected with which, the action is brought (d), and the inspection of which may be material to the proper determination of the question in dispute (dd). An order cannot be made under this rule in an action for a nuisance by noise and vibration for the inspection of the *plaintiff's premises* to ascertain the extent to which they are affected thereby, they not being the subject-matter of the action (e). The inspection may be had at any time before, or, as it seems, at the trial of the action (f). It may also be obtained, *à fortiori*, after judgment, when the right of the applicant is ascertained (g). The rule is not restricted, *in express terms*, to property of the opposite party, if in his possession, or to property in his possession, provided he may be supposed to have control over the party who is in possession (h), but an order cannot be

Inspection of property the subject of the action.

(a) *V. post*, p. 149, as to what the right of inspection includes.

(b) Ord. LII. r. 3; *cf.* C. L. P. Act, 1854, s. 58; 24 & 25 Vict. c. 10, s. 17.

(c) See Ord. LII. r. 1.

(d) See Irish C. L. P. Act (16 & 17 Vict. c. 113), s. 47.

(dd) See C. L. P. Act, 1854, s. 58; *Whaley v. Brancker*, 10 L. T. 155; *Kynaston v. East Ind. Co.*, 3 Swanst. 248, 3 Bligh, 153; *Smith v. Peters*, L. R. 20 Eq. 511. Inspection of personal property has been granted to enable plaintiff claiming it to identify and specify it (*Earl of Macclesfield v. Davis*, 3 V. & B. 16; see *Marsden v. Panshall*, 1 Vern. 407).

(e) *Gaunt v. Fynney*, W. N. 1870, 162.

(f) See *Meyer v. Barnett*, 3 F. & F. 696; *Line v. Taylor*, *ib.* 731.

(g) *Kynaston v. East Ind. Co.*, *supra*.

(h) See *Morley v. Great Central Gas Co.*, 2 F. & F. 373.

made with respect to property in a *foreign* country (*i*). The application must be made to a judge at chambers (by summons) in the Queen's Bench Division (*k*), and (by motion) to a judge in Court in the Chancery Division, and, if made by a plaintiff, may be made at any time after the issue of the writ of summons (*l*), and, if by a defendant or any other party (*e.g.*, a third party), at any time after he has appeared (*m*); in either case it must be made on notice to the opposite party (*n*), except in cases of emergency, where the object of the application would be otherwise defeated (*o*).

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Application must be to judge.

In the Court of Chancery, inspection of property was granted in two classes of cases; (1) Where one person had a legal interest by contract, statute, or otherwise, in the value of the property of another (*p*), *e.g.*, a claim to tithes in respect of the annual value of premises belonging to the opposite party (*q*), or a claim as agent to commission on the value of goods purchased or work done by him for his principal (*r*), and there was no other mode of ascertaining the value of such premises, goods, or work; and (2), in cases of trespass upon or other injury to real property, such as mines, when it was (and still is) granted almost as a matter of course (*s*). "It is established by the cases," said Lord Romilly, M. R., (*t*) "that if a person is making use of his property to the injury of the property of his neighbour, the latter is entitled to an inspection in order to ascertain the extent of the injury, and this Court only requires him to show a *prima facie* case, and the mere contradiction of the defendant amounts to nothing, unless he shows positively that no injury has been done to him. There must, in the absence of contract, be a *prima facie* case, showing a *reasonable ground for the belief* *Prima facie*

1. Where interest in value of property of another.

2. Where injury to real property.

(*i*) See *per* Lord Westbury, L. C., in *Betts v. Neilson*, L. R. 5 E. & I. App. 1, 11.

(*k*) Ord. LIV. r. 2 a.

(*l*) Ord. LII. r. 4; *Cooper v. Ince Hall Co.*, W. N. 1877, 24; *Amies v. Kelsey*, 22 L. J. Q. B. 84; see, however, *Whaley v. Brancker*, 10 L. T. 155.

(*m*) *Ib.* It seems, however, that a defendant will not be allowed inspection until he has put in his defence (*Anon.* W. N. 1877, 53).

(*n*) *Ib.*

(*o*) *Henessy v. Rohmann*, W. N. 1877, 14; see, however, *Whaley v. Brancker*, *supra*.

(*p*) See *East Ind. Co. v. Kynaston*, 3 Bligh. 153, 3 Swanst. 248; *Bennit v. Whitehouse*, 28 Beav. 119.

(*q*) *East Ind. Co. v. Kynaston*, *supra*.

(*r*) See *per* Lord Redesdale, *ib.* 166; *per* Lord Eldon, L. C., *ib.* 262, 264.

(*s*) See *per* Lindley, J., W. N. 1876, 24. For form of summons, *v. post*, p. 197.

(*t*) In *Bennit v. Whitehouse*, 28 Beav. 119, 121.

CHAP. VIII. *that an injury is committed.* * * * Wherever it appears that a person has power to make use of his land to the injury of another, and there is *prima facie* evidence of his doing so, though it is contradicted, still as the only way of ascertaining the fact is by an inspection, the Court always allows it, if it can be done without injury to the defendant" (u). The foundation of the right in such cases, is that *necessity* (i.e., for the purpose of proving the applicant's case) requires the inspection (x), and the Court should take care to impose as little inconvenience as possible on those on whom the order is made (y); in the words of Vice-Chancellor Wigram, a case must be shown "as well of *necessity* as of *irreparable mischief*" (z). In granting this relief the Court looks at the nature of the suit, the purposes for which it is sought, and whether the case is such that the Court is authorised in interfering with the defendant's property (a). Inspection will not be granted where it would be useless, as of an alleged nuisance the effects of which must be *externally* apparent, though the cause of its existence may be internal (b).

case of injury must be shown.

It must be shown that applicant can not prove his case without the inspection.

Inspecting party may be ordered to give indemnity and pay costs.

Court may order all things necessary to the inspection.

The inspection is to be granted "upon such terms as may seem just" (c), that is, as to *costs*, *indemnity* for any loss or damage sustained by the other party in consequence of the inspection, and otherwise (d), and the applicant may be ordered to give security for or deposit in Court a sum sufficient to provide such indemnity, and must, in any case, pay the costs of the inspection (e). The Court or judge ordering inspection has power, as ancillary thereto, to order the removal, where necessary, of anything that obstructs the inspection, and the doing of all acts necessary to render it effectual (f), e.g., the repair and ventilation of a mine, or the re-

(u) *Id.* 122. See cases cited in Bainbridge on Mines, pp. 315 *seq.*, and Kerr on Injunctions, 157 *seq.*; *Whaley v. Brancker*, 10 L. T. 155; *Saul v. Metrop. Ry. Co.*, W. N. 1867, 99; *Lewis v. Marsh*, 8 Ha. 97.

(x) See *per* Wigram, V.-C., 8 Ha. 98.

(y) See *per* Lord Eldon, L. C., 3 Swanst. 262.

(z) 8 Ha. 99. See *post*, p. 175, Inspection in patent cases.

(a) *Per* Stuart, V.-C., 18 W. R. 784.

(b) *Barlow v. Bailey*, 22 L. T. 464; *cf. Bailey v. Kynock*, L. R. 19 Eq. 90; *Piggott v. Angl. Amer. Telegraph Co.*, 19 L. T. 46.

(c) R. 3.

(d) *Cf.* C. L. P. Act, 1854, s. 58.

(e) See the form of order in *Bennett v. Griffiths*, 3 E. & E. 467. No appeal lies from the order of the judge as to costs, they being in his discretion (*Mitchell v. Darley Coll. Co.*, 10 Q. B. D. 457).

(f) See *Bennett v. Griffiths*, and cases there cited; *White v. Storey*, 43 L. T. 91.

removal of barriers (*g*), for the Court when it orders inspection will not stop short of what is necessary to make its jurisdiction effectual (*h*). The order may also, for the purposes of the inspection, authorise any person or persons to enter upon or into any land or building in the possession of any party to the action, and any samples to be taken (*i*), or observation to be made or experiment to be tried (*k*) which may seem necessary or expedient for the purpose of obtaining full information or evidence (*l*). Under the Patent Law Amendment Act, 1852, s. 42, in an action for the infringement of a patent relating to type, inspection and delivery for the purpose of analysis of a portion of the type used by the defendant, was ordered in the Court of Chancery (*m*) (after being refused in the Court of Exchequer) (*n*), though necessarily involving the destruction of the portion so analysed; and in a case of encroachment upon mines, leave was given to make a driftway through the defendant's wall for the purposes of the inspection (*o*), but an application before the hearing for leave to enter upon the opposite party's property and cut trenches in the soil and do other acts therein to ascertain its geological formation was refused (*p*). The order should provide for the length of notice to be given before inspecting, and (if necessary) the time to be allowed before the notice is given (*q*). Under the C. L. P. Act, 1854, s. 58, an order might be made for inspection not only by the party himself and his witnesses (*r*), but also by his workmen and agents (*s*). The present rule does not in

By whom inspection may be had.

(*g*) *Earl of Lonsdale v. Curwen*, 3 Bligh. 168 n.; *Walker v. Fletcher*, *ib.* 172 n.

(*h*) *Per Wood*, V.-C., John. 730.

(*i*) *Hennessey v. Rohmann*, W. N. 1877, 14; *cf. Patent Type Co. v. Walter* (No. 2), John. 727. The party inspecting must pay the full value of any samples taken (*ib.*).

(*k*) The Court may order experiments to be made for its own guidance (see *Dickenson v. Grand Junc. Ry. Co.*, 15 Beav. 260; *Case v. Midl. Ry. Co.*, 27 *ib.* 247; *Badische Fabrik v. Levinstein*, W. N. 1883, 62).

(*l*) Ord. LII. r. 3.

(*m*) *Patent Type Co. v. Walter*, *supra*.

(*n*) S. C. 5 H. & N. 192; see as to inspection in such cases generally, *post*, p. 175.

(*o*) *Bennett v. Griffiths*, 3 E. & E. 467.

(*p*) *Ennor v. Barwell*, 1 De G. F. & J. 529 (varying on appeal the order of Stuart, V.-C., 8 W. R. 300).

(*q*) See the form of order made by Lindley, J., in the case of *Cooper v. Ince Hall Co.*, W. N. 1877, 24, and by Stuart, V.-C., in *Ennor v. Barwell*, *supra*.

(*r*) See *Kynaston v. E. I. Co.*, 3 Swans. 248; *Singer Co. v. Wilson*, 12 L. T. 140.

(*s*) See the forms of order made in *Bennett v. Griffiths*, *Patent Type Co. v. Walter*, and *Ennor v. Barwell*, *ubi supra*. Notice may be required to be

CHAP. VIII. any way limit the persons by whom the inspection may be had. Inspection may be allowed to independent persons, *e.g.*, experts, agreed upon between the parties, where it would be refused to the party personally, as being a rival in trade (*t*).

given of the names and descriptions of the persons intended to inspect (see the forms of order made in *Walker v. Fletcher*, 3 Bligh. 172, 178, and *Lewis v. Marsh*, 8 Ha. 97, 100).

(*t*) See *Flower v. Lloyd*, W. N. 1876, 230 (XX. S. J. 703), where the Lords Justices modified the Vice-Chancellor's order (*ib.* 169) in this respect; *ante*, p. 143.

CHAPTER IX.

OF THE CONSEQUENCES OF FAILURE TO GIVE DISCOVERY.

A PARTY who fails to comply with an order to answer interrogatories, or for discovery (*i.e.*, *disclosure*) or inspection of documents is liable to attachment (*a*). Applications for the issue of a writ of attachment, which writs have the same effect as writs of attachment issued out of the former Court of Chancery (*b*), must be made to a Judge in Court or at chambers (*c*), on notice to the party against whom the attachment is sought (*d*). If made to a Judge in Court, it must be made by motion in the ordinary way (*e*). It is not necessary that it should be made by the party who obtained the order for discovery, but it may be made by any person who though not a party on the record, is beneficially interested in the action, and aggrieved by the disobedience, and who is in the position of a *cestui que trust* suing by a trustee (*f*); thus, the official liquidator suing on behalf of a company in liquidation was held entitled to enforce an order obtained by the defendant in the action requiring some of

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Party making default in discovery liable to attachment.

Who may apply.

(a) Ord. XXXI. r. 20. See *Re Mulcaster's Estate*, W. N. 1878, 81. This rule does not, of course, apply to persons *privileged from arrest* (see Dan. 420; *Re Anglo-French Co-operative Society*, 14 Ch. D. 533), or *corporations* (see *Mackenzie v. Sligo, &c. Ry. Co.*, 9 C. B. N. S. 250). In the Court of Chancery, orders for discovery were also enforceable by *sequestration* (see *Goldsmith v. G.*, 5 Ha. 123), but this method of proceeding seems, in the case of discovery, to be impliedly taken away by the above rule. If such a writ is still issuable, there is no necessity for its being preceded by a writ of attachment (*Miller v. M.*, 39 L. J. P. & M. 38).

(b) Ord. XLIV. r. 1. This proviso is immaterial as regards attachment for failure to give discovery. See, as to such writs generally, Dan., 411 *seq.*, *Morgan's Law of Costs*, 527 *seq.*, and Ord. XLIV.

(c) See Ord. LIV. r. 2.

(d) *Ib.* r. 3; see *Abud v. Riches*, 2 Ch. D. 528; *Jupp v. Cooper*, 5 C. P. D. 26; *Eynde v. Gould*, W. N. 1882, 74. See as to service of notice, *post*, p. 152, and for a form of motion, *post*, p. 200.

(e) Ord. LIII. r. 1. *Re a solicitor*, 14 Ch. D. 152.

(f) *Madrid Bank v. Bayley*, L. R. 2 Q. B. 37.

CHAP. IX. the directors of the company to answer interrogatories, a stay of proceedings having been directed in default of their doing so (g). Partial compliance with an order for discovery does not prevent the liability to attachment (h), and it is no answer to the application to show that the applicant is in contempt for non-payment of costs to the other party (i).

Service of order for discovery on solicitor sufficient.

Service of an order for discovery (which includes an order to answer interrogatories) (k) or inspection on the solicitor of the party against whom it is made is sufficient service to found thereon an application for an attachment for disobedience of the order (l), but the party against whom the attachment is sought may show in answer to the application that he has had no notice or knowledge of the order (m). It is not absolutely necessary that the notice of motion or summons should be served upon the party against whom it is intended to be made *personally*; in an action, it may be served upon his *solicitor*, as being equivalent to service upon the party himself (n); it may also be served by leaving it at his place of residence (o), or by filing it with the proper officer where no appearance has been entered (oo).

Notice of application need not be served personally.

Writ not issued as matter of course.

The writ is no longer issued as a matter of course; it is now an order of Court, to be made upon notice, and therefore in many cases after discussion (p), and it seems that a party will not be allowed to pursue this remedy where no material discovery is necessary from the defaulting party, and, consequently, no benefit can be derived from keeping him in custody (q), the proper course being to take his case as confessed, and not apply for an attachment (r). In the Court of Chancery, a party was not kept in custody where taking

(g) *Madrid Bank v. Bayley*, L. R. 2 Q. B. 37.

(h) *Mornington v. Keene*, 4 W. R. 793.

(i) *Wilson v. Bates*, 3 Myl. & Cr. 197.

(k) *Dalston v. Nanson*, 47 L. J. Ch. 609. An order for the disclosure of the names of partners suing as a firm (under Ord. XVI., r. 10 a) is not an order for discovery within the meaning of this section (*Pike v. Keene*, 35 L. T. 841).

(l) See Ord. XXXI. r. 21; *Joy v. Hadley*, 47 L. T. 615.

(m) *Ib.* See *Von Hoff v. Hoersten*, 27 L. J. Ex. 299. A solicitor upon whom such an order is served, and who neglects, without reasonable excuse, to give notice of it to his client, is himself liable to attachment (r. 23).

(n) *Browning v. Sabin*, 5 Ch. D. 511; *Richards v. Kitchen*, 36 L. T. 730; *Joy v. Hadley*, *supra*. See Cons. Ord. III. r. 6.

(o) *Re a Solicitor*, 14 Ch. D. 153 (see, however, *Mann v. Perry*, 44 L. T. 248); *Young v. Y.*, XXVI. S. J. 404.

(oo) *Young v. Y.*; see *Morton v. Miller*, XX. S. J. 603.

(p) See *per Jessel*, M. R., 2 Ch. D. 528; 21 *ib.* 366.

(q) See *per Cormick*, V.-C., 9 Ir. Eq. R. 474.

(r) See *Johnson v. M'Auley*, Sau. & Sc. 707; *O'Brien v. Manders*, 2 Ir. Eq. R. 39.

the bill *pro confesso* against him would answer the purposes of justice, because no discovery was required from him (s). Although a party may be technically entitled to apply for an attachment, he should not do so for the purpose of making costs, or unless he is genuinely and honestly desirous of enforcing the discovery in giving which default has been made (t). Before issuing the writ the Court or Judge must be satisfied (by affidavit) of the due service of the order for discovery (u), and that it has not been obeyed. If no appearance has been entered, an affidavit of service of the writ will be necessary, and if an enlarged time has been obtained for giving the discovery it should be shown by affidavit, or by an office copy of the order for further time, that such time has expired (x). Upon an application for an attachment for not answering interrogatories, the materiality of the interrogatories cannot be inquired into, unless it clearly appears upon the face of them that they have been framed for the purpose of delay, and have nothing to do with the object of the suit (y), but the question whether the party in default is *privileged* or not from answering may be raised (z). The Court is, however, in the habit upon such occasions of inquiring what benefit the applicant expects to derive from the discovery sought. A party in custody for default in filing an affidavit of documents will not be heard to say that he has no such documents (a), but in a case where it appeared that the admission of possession had been made by *inadvertence*, and that the party was genuinely unable to produce the documents, the writ was discharged (b). The Court will not allow the process to be used *oppressively*; an attachment was refused where the party in default for not answering had reasonable ground for thinking that the answer would not be required without a previous intimation to that effect (c), as also where the party was unable through illness to put in his answer (d), and where the answer had been filed though out of time (dd),

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Proof of default to be given.

(s) See *Woodward v. Conebeer*, 2 Ha. 506; Cons. Ord. XXII. r. 5.

(t) See *Thomas v. Palin*, C.A., 21 Ch. D. 360.

(u) *V. ante*, p. 152.

(x) Braithwaite's Pr. 165.

(y) *Reynolds v. Bloomfield*, 8 Ir. C. L. Rep. xiv.

(z) *M'Mahon v. Ellis*, 10 ib. 120; *Jones v. Powell*, 1 Swan. 535.

(a) *Hard v. Partington*, 12 Price, 689; *v. ante*, p. 113 (h).

(b) *Nugent v. N.*, Sau. & Sc. 704.

(c) *Siderfield v. Thatcher*, 11 Beav. 201.

(d) *Hicks v. Lord Alvanley*, 9 ib. 163.

(dd) *Curran v. Elphinstone*, 4 W. R. 50; *Windle v. Lane*, 29 L. J. Ex. 245.

CHAP. IX. and, generally, it will not be granted against a party for failure to comply with an order for discovery which he is satisfactorily shown not to be in a condition to give (*e*). So, if an application were made to dismiss the action, no Court would make such an order (*f*). A married woman may be attached for want of an answer, where she disobeys an order for discovery (*g*). The writ will not be issued for non-compliance with an order for discovery which does not limit the time within which it is to be given (*h*), but it is no longer necessary, as under the former practice in Chancery (*i*), that the copy order served upon the party or his solicitor should be endorsed with a notice of the consequences of disobedience (*k*).

Not issued for first default.

In the case of insufficient *answers*, it was not the practice of the Court of Chancery to order a committal until a *third* insufficient answer had been put in, or a *fourth* insufficient examination held (*l*); under the present practice, it is left entirely to the discretion of the Judge (*m*). When the order is made, it is usual to direct that it shall lie in the office or not come into operation until after the expiration of a limited time (which was usually a week in the Common Law Courts), in order to give the opposite party an opportunity of giving the discovery (*n*), and it seems that a *locus poenitentiae* should always be allowed (*o*). The writ is made returnable at such time as the Court or Judge may direct (*p*), which should be a reasonable time after the execution (*q*), but it is not necessary that a date be specified therein for the return (*r*); if no return is made, the party obtaining the writ, may after a reasonable interval require the sheriff to

When returnable.

(*e*) See *per* Cotton, L. J., 7 Q. B. D. 560; *Bainbridge v. Blair*, 1 Jur. 256.

(*f*) *Ib.* V. *post*, p. 156.

(*g*) Dan. 422-3; see L. R. 7 Eq. 265 n. (4), as to the practice in such cases.

(*h*) *Thomas v. Palin*, C.A., 21 Ch. D. 360.

(*i*) Cons. Ord. XXIII. r. 10.

(*k*) *Thomas v. Palin*, *supra*. The order must, however, be entered (*Ballard v. Tomlinson*, 48 L. T. 515).

(*l*) Cons. Ord. XVI. r. 17; *Alfrey v. A.*, 12 Beav. 90; *Hayward v. H., Kay*, xxxi. This rule did not apply to the case of affidavits of documents (*Harford v. Lloyd*, 2 W. R. 537).

(*m*) *Abud v. Riches*, 2 Ch. D. 528; *Dallas v. Glyn*, 3 Ch. D. 190; *Thomas v. Palin*, 21 *ib.* 360.

(*n*) See *Re Mulcaster's Estate*, 47 L. J. Ch. 609; *Thomas v. Palin*, 21 Ch. D. 360.

(*o*) See *per* Malins, V.-C., 3 *ib.* 192.

(*p*) Consol. Ord. XII. r. 1.

(*q*) See *Snowball v. Dixon*, 4 Y. & C. 511.

(*r*) *Owen v. Pritchard*, W. N. 1876, 147.

do so (s). Where the party against whom the attachment is sought is out of the jurisdiction, it cannot be made returnable immediately (t). The costs of the attachment, both as to incidence and amount, are in the discretion of the Court or Judge, there being no longer any fixed amount in such cases (u), and should be provided for in the order for the issue of the writ; though if this be not done at the time, they may be obtained by a separate application, at the expense of the applicant, if such a course should involve additional costs (x). Upon an application for an attachment against a defendant for not answering interrogatories, the Court of Common Pleas held that they had jurisdiction, under sect. 46 of the C. L. P. Act, 1854, to order the examination as witnesses of persons suspected to be the real defendants, there being good reason to believe that the defendant on the record was fictitious (y).

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Costs are in discretion of Court.

The party in contempt, immediately on filing his answer or affidavit, should obtain and serve an order of discharge (on payment or tender of costs to be taxed) (z), which may be obtained *ex parte* at the Rolls (a), or on notice in the ordinary way (b), on proof (by production of an office copy of the answer, or a certificate of the filing) of the purging of the contempt; and, on obtaining the bill of costs, should either pay the amount or get them taxed without delay, and when taxed, tender the amount immediately. If he omits to do this, his opponent has a right to insist that the answer or affidavit shall not remain on the file, provided he refrain from taking any proceeding founded upon it in the meanwhile (c). He cannot be detained in custody until the sufficiency or otherwise of his answer or affidavit has been ascertained, for an answer is to be deemed sufficient unless and until formally objected to (d). The opposite party may,

Obtaining discharge.

(s) *Ib.*(t) *Zulueta v. Vincent* (No. 1), 15 Beav. 273.(u) *Abud v. Riches*, 2 Ch. D. 528 (see Ord. LV.).(x) *Ib.*(y) *Morgan v. Alexander*, L. R. 10 C. P. 184 (followed in *Moline v. Tasm. Ry.*, 32 L. T. 828).

(z) See a form of order in 4 Ha. 473.

(a) See *Abud v. Riches*, *supra*; *Price v. P.*, 48 L. J. Ch. 215; *Re Manning*, XXV. Sol. Journ. 472.(b) *Price v. P.*(c) See *Wilkin v. Nainby*, 4 Ha. 473, 475, *per* Wigram, V.-C.; *Coyle v. Allen*, 16 Beav. 548; *Taylor v. Sheppard*, 1 Y. & C. 99.(d) See *Lafone v. Falkland Isl. Co.*, 2 K. & J. 276; *Balfour v. Farquharson*, 1 S. & S. 72.

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Party cannot
be detained
for non-pay-
ment of costs.

however, object to the answer or affidavit as insufficient and get him recommitted if it prove to be so (e), without being obliged to take up the process of contempt against him again *ab initio* (f). Since the passing of the Debtors Act, 1869, a party who has purged his contempt cannot be kept in custody or re-committed for non-payment of the costs of his contempt or of the application (g), though it may have been made part of the order of the discharge that he shall pay them (h), the opposite party being left to enforce payment as he best can (i). In the Queen's Bench Division, however, it is said to be the practice not to grant the discharge except on payment of the costs (k). If, after receiving notice of the application for committal, the party in default clears his contempt before it is heard, he should tender the applicant a sum for costs or get his costs taxed, and if the latter persists in his application, he does so at the peril of costs (l). The order of discharge may be rescinded if obtained by misrepresentation, in which case the original attachment will revive (m), and the question of the sufficiency of the answer or affidavit may be raised upon the application to rescind (n).

Contempt may
be waived.

A contempt may be waived, *e.g.*, by accepting an answer filed without payment of the costs of the contempt (o), or by accepting and acting upon an answer, *e.g.*, by applying for the production of documents referred to in it (p), or taking any other proceeding founded upon it, or signing final judgment by consent (q).

Action may be
dismissed or
defence struck
out.

In the case of plaintiffs and defendants in an action, who make default in obeying orders for discovery, they are, in addition to the liability to attachment, liable, in the case of the former, to have their actions dismissed for want of pro-

(e) See *per Wood*, V.-C., 2 K. & J. 277.

(f) Cons. Ord. XII. r. 7.

(g) *Jackson v. Mawby*, 1 Ch. D. 86; *Mickelthwaite v. Fletcher*, 27 W. R. 793; *Clark v. Dyson*, LXXIII. Law Times, 880. See, however, *Re M.*, 46 L. J. Ch. 24.

(h) See *Abud v. Riches*, 2 Ch. D. 528; *Tilney v. Stansfeld*, 28 W. R. 582 (which shows the proper form of order).

(i) *Jackson v. Mawby*. He is entitled to have the answer or affidavit taken off the file (*v. ante*, p. 155).

(k) *Per Day, J.*, in *Clarke v. Dyson*, *ubi supra*.

(l) See *per Jessel, M. R.*, 21 Ch. D. 363.

(m) *Price v. P.*, 48 L. J. Ch. 215.

(n) *Ib.*

(o) *Roberts v. Albert Bridge Co.*, L R. 8 Ch. App. 753; *Landors v. Allen*, 6 Sim. 619.

(p) *Hoskins v. Lloyd*, 1 S. & S. 393; Dan. 431 *seq.*

(q) *Hayne v. Pratt*, L. R. 6 C. P. 105.

secution, and in the case of the latter, to have their statements of defence struck out, and to be placed in the same position as if they had not defended (r). This provision, however, is considered a *highly penal* one, which will *only be exercised in the last resort*, and, apparently in no case where there is a real intention to give fair discovery (s). Accordingly it has been held that unless an answer is so palpably insufficient as to show want of *bona fides*, the proper course is to apply for a further answer (t). In the Court of Chancery, bills might be ordered to be taken *pro confesso* against the defendant, where the plaintiff was *unable with due diligence to procure the execution of a writ of attachment* against him by reason of his being out of the jurisdiction, or being concealed, or some other cause, and the defendant was consequently deemed to have absconded to avoid or to have refused to obey the process of the Court (u), but there was a "large discretion" as to granting such orders (x). In the case of foreign litigants, persons privileged from arrest, corporations, &c., this is the only effectual mode of reaching them, as also in cases where it would be impossible to procure the execution of a writ of attachment against the defaulting party (y). Although, as a general rule, the fact that a defendant has not complied with an order for discovery, is sufficient to excuse a plaintiff from proceeding with his action, the defendant has still a technical right to apply to dismiss it for want of prosecution (z), and the fact of a defendant's having filed interrogatories for the examination of the plaintiff does not suspend or interfere with his right to have the action dismissed for want of prosecution, although the time for answering has not expired (a).

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Provision only
exercised as a
last resource.

(r) Ord. XXXI. r. 20. The Court of Chancery possessed a similar jurisdiction to dismiss a bill for default of discovery (*Rep. Liberia v. Roye*, 1 App. Cas. 139), and where a defendant made default, the bill might be ordered to be taken *pro confesso*, (Dan. 442—3).

(s) *Per Lush, J., Anon.* W. N. 1875, 202; *cf. Twycross v. Grant*, *ib.* 201; *Hartley v. Owen*, W. N. 1876, 193. An order was made to strike out a defence in a case of "frightful procrastination" (*S. C.*, W. N. 1875, 229); see also *Fisher v. Hughes*, XXI. S. J. 478, (where the order was made after several adjournments granted), and *Danvillier v. Myers*, C. A., W. N. 1883, 58.

(t) *Kennedy v. Lyell*, C. A., W. N. 1882, 137; *Danvillier v. Myers*.

(u) Ch. Cons. Ord. XXII, r. 2; Dan. 442, *seq.*

(z) See *Zulueta v. Vincent* (No. 1) 15 Beav. 272.

(y) See Dan. 420.

(s) *Cooper v. Castle*, C. A., XXI. Sol. Journ. 457. See *Howe v. Grey*, W. N. 1867, 141.

(a) *Jackson v. Ivinney*, L. R. 1 Eq. 693.

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An action will not be dismissed because one of several co-plaintiffs has not complied with an order for discovery, it being satisfactorily shown that he is not in a condition to do so (b), and *semble*, the same rule would apply to the case of a sole plaintiff, but there is no discretion as to enforcing an order for discovery made on the nominal plaintiffs on the record because of the hardship to the real plaintiffs from the action being stayed or dismissed (c). The direction that the application shall be made by "the party *interrogating*" might be supposed to confine the rule to cases of default in answering interrogatories, but in practice the provision has been treated as equally applicable to cases of default in giving discovery of documents (d), so that the expression must be considered as equivalent to "the party seeking the discovery." The application must be made to a Master at chambers in the Queen's Bench Division, and, as a rule, to a Judge in Court in the Chancery Division (e).

(b) See *per* Cotton, L. J., 7 Q. B. D. 561; *Hartley v. Owen*, 34 L. T. 752, where the affidavit of the wife of an absconding co-plaintiff was accepted as sufficient.

(c) *Wilson v. Raffalovich*, C. A., 7 Q. B. D. 553.

(d) See *Anon.*, W. N. 1875, 202, 204; *Fisher v. Hughes*, XXI. S. J. 478; *cf. Rep. Liberia v. Roye*, 9 Ch. App. 569; 1 App. Cas. 139.

(e) *Evelyn v. E.*, 13 Ch. D. 138; *Contra, Freason v. Loe*, 26 W. R. 138.

CHAPTER X.

DISCOVERY IN PARTICULAR ACTIONS.

SECT. 1.—*Discovery from corporations, companies, public bodies, and foreign states.*

IN actions by or against *corporations aggregate (a), joint-stock companies, and other bodies of persons* empowered by law to sue or be sued in their own names, or in the name of any officer or other person, discovery may be obtained from an officer or member thereof, as representing it (b), so that it is no longer necessary to make such an officer or member a party to the action for the purpose of obtaining discovery (c), as under the former Chancery practice, and if such a person is made a party for such a purpose, his name will be struck out with costs against the party who made him so (d). A foreign corporation is on the same footing as a native one, as far as regards discovery, and it will be assumed that its secretary or officers are under its control, so that an order upon them to give discovery will be made as a matter of course (e), with the usual consequences, in case of failure to comply, of striking out the claim or defence, such being the only way of reaching them (f).

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Discovery from officer or member of corporation or company.

In the case of interrogatories, application must be made by the party seeking to interrogate, by summons at Chambers, for an order empowering him to deliver them to such member or officer (g), the object of requiring such leave to

Leave to interrogate must be obtained.

(a) A corporation sole must of course answer on oath in the ordinary way (see 1 Cl. & F. 347, 349 *in arg.*).

(b) Ord. XXXI. rr. 4, 12; *Berkeley v. Standard Dis. Co.*, (No. 2) C. A., 13 Ch. D. 97. The former rule is substantially a re-enactment of s. 51 of the C. L. P. Act, 1854.

(c) *Wilson v. Church*, 9 Ch. D. 552.

(d) *Ib.*

(e) *Collins v. Brown*, 3 K. & J. 423; *per* Wood, V.-C., L. R. 2 Eq. 732.

(f) See *per* Blackburn, J., 1 Ch. D. 174; *ante*, p. 157.

(g) Ord. XXXI. r. 4; *cf.* C. L. P. Act, 1854, s. 51.

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Proper person
should be
selected to
answer.

be given being to insure that a proper person is chosen to give discovery (*h*). The order will not be made *ex parte*, but the summons should be served upon the corporation, company, or body whose interest it is to see that the proper person is selected to answer (*i*), and *semble*, the officer or member should not appear in the matter at all (*k*), though he may afterwards apply to rescind the order (*l*). If the interrogatories are delivered without an order they will be struck out (*m*), or might simply be left unanswered. The summons should specify the particular officer or member selected to answer (*n*), and some good reason should be shown, by affidavit or otherwise for the selection (*o*), and the Judge or Master should exercise his discretion in the matter in selecting a person who is likely to know and answer accordingly (and over whom the corporation or company has control), it being for him to decide who is to be interrogated (*p*). The applicant should not select a friend of his own, or a person who will in all probability decline to give the discovery (*q*). If reason be shown why one member or officer can give information on one set of questions, and another member or officer on another set, the Court can direct more than one to answer (*r*). It is assumed that the secretary or other officers of a trading corporation or company are under its control so as to be compellable to put in an answer (*s*.) Under this rule and the corresponding sections of the Common Law Procedure Act, 1854, the public officer (*t*), and the manager (*u*) of a joint-stock bank,

(*h*) *Singer Co. v. Long*, XXII. Sol. Journ. 854.

(*i*) See *per* Jessel, M. R., in *Berkeley v. Stand. Disc. Co.* (No. 2), 13 Ch. D. 97, at p. 99.

(*k*) See *per* Thesiger, L. J., *ib.* 101.

(*l*) *Berkeley v. Stand. Disc. Co.* (No. 1), 9 Ch. D. 643. *Sed quare*.

(*m*) *Carter v. Leeds, &c. Co.*, W. N. 1876, 11.

(*n*) *Berkeley v. Stand. Disc. Co.*, 9 Ch. D. 643. Under s. 50 of the C. L. P. Act, 1854, the Court or Judge selected the person to answer (see *Lacharme v. Quartz, &c. Co.*, 1 H. & C. 134).

(*o*) See *Prioleau v. U. S.*, L. R. 2 Eq. 659.

(*p*) *Rep. Costa Rica v. Erlanger*, C. A., 1 Ch. D. 171; *Wilson v. Church*, 9 *ib.* 552; *Berkeley v. Standard Dis. Co.*, C. A., *ubi supra*.

(*q*) See *per* Mellish, L. J., 1 Ch. D. 173.

(*r*) *Per* Jessel, M. R., 9 *ib.* 537; see *Anderson v. Bank of Brit. Columbia*, 2 Ch. D. 644, where the affidavit of documents was made by the Manager of the Defendant's Bank and another officer.

(*s*) *Per* Wood, V.-C., L. R. 3 Eq. 732.

(*t*) *M'Kewan v. Roll*, 4 H. & N. 738 (see *Hall v. Connell*, 3 Y. & C. 707).

(*u*) *Anderson v. Bank of Brit. Columbia*, 2 Ch. D. 644.

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the secretary of a railway company (*x*), a director (*y*), ex-director (*z*), and the chairman (*a*) of a joint-stock company, and the official liquidator (*b*) of a company in process of winding up have been pronounced proper persons to give discovery. In one case a director of a joint-stock company which had ceased to carry on business was ordered to produce documents belonging to the company, which were admitted to be in his possession (*c*), and the public officer of a joint-stock banking company has been held to be still its representative for the purpose of giving discovery, notwithstanding its dissolution (*d*). The solicitor upon the record of a corporation, however, is not an officer who should be called upon to give discovery (*e*), and it seems that a member should not be directed to give the discovery where there is an officer who has a competent knowledge of the facts (*f*). Ordinarily, the secretary of a company is the proper person for the purpose (*g*), but a member (*h*), or director may be selected instead, provided he has not an adverse interest to the success of the company in the action (*i*). The officer or member must be such *at the time the order is made* (*k*), but officers of a company do not cease so because a winding-up order is made and an official liquidator appointed (*l*), and an officer will not be allowed to evade giving discovery by resigning his situation after the action is commenced (*m*). The ordinary practice is for the solicitor of the corporation or company to act for the officer or member, and prepare

Secretary of company.

Officer or member must be such at time.

Answer should be prepared by solicitor of corporation.

(*x*) *Beckervaise v. G. W. R.*, L. R. 6 C. P. 36.

(*y*) *Lacharme v. Quartz, &c. Co.*, 1 H. & C. 134.

(*z*) *Berkeley v. Stand. Disc. Co.* (No. 1), 9 Ch. D. 643.

(*a*) *Wilson v. Church*, *ib.* 552.

(*b*) *Welch Coll. Co. v. Gaskell*, 36 L. T. 352.

(*c*) *Lacharme v. Quartz, &c. Co.* The Court considered him as virtually an officer.

(*d*) *Hall v. Connell*, 3 Y. & C. 707.

(*e*) *Brown v. Thames, &c. Co.*, 43 L. J. C. P. 112. In *Swansea Corporation v. Quirk*, 5 C. P. D. 106, the solicitor gave the discovery in his capacity of town clerk.

(*f*) See *per* Jessel, M. R., 13 Ch. D. 99.

(*g*) *Berkeley v. Stand. Disc. Co.* (No. 1), *ubi supra*; *Re Alexandra Palace Co.*, 16 Ch. D. 58, 59; *Manchester Paving Co. v. Slagg*, XXVI. Sol. Journ. 599, 643.

(*h*) *Berkeley v. Stand. Disc. Co.*

(*i*) *Manchester Paving Co. v. Slagg*.

(*k*) *Madrid Bank v. Bayley*, L. R. 2 Q. B. 37; *Ellwand v. M'Donnell*, 8 Beav. 14.

(*l*) *Id.* In such a case the official liquidator might be ordered to give the discovery (*Welsh, &c. Coll. Co. v. Gaskell, supra*).

(*m*) *Acomb v. Landed Estates Co.*, 14 W. R. 387.

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Officer or
member not
entitled to
costs of
answering.

his answer, charging the corporation or company with the cost of so doing. The officer or member should not, as a rule, put in his answer by a separate solicitor, and in no case has he any right to withhold his answer until he has been paid any costs which he may have incurred, such costs being generally made costs in the action, and recoverable as such by the company if successful (*n*). If an officer who is also the solicitor of the public body is put forward by it to answer, the privilege ordinarily attaching to professional communications between solicitor and client is thereby waived (*o*).

Duty of officer,
etc., to get
information.

The interrogatories themselves will not be gone into upon the application (*oo*) ; if any objection is afterwards taken to them, it must be taken by the corporation or company, and not by the officer (*p*). If the officers or members who are ordered to give discovery should find themselves unable to do so, it is not enough for them to state that fact without stating the circumstances upon which the conclusion is founded, as that may be a matter of law (*q*), and they are liable to the usual consequences of a failure to comply with the order (*r*) ; they must not only answer as to their individual knowledge, but in answering for the company they must get such information as they can from other servants of the company who have personally conducted the transaction in question, and they cannot properly answer by saying that they know nothing about the matter, when it is in their power to obtain information from other servants of the company who may have personal knowledge of the facts (*s*). If the officer or member neglects or refuses to answer, application should be made for an order *against him* requiring an answer or further answer (*t*).

Affidavit of
documents by
officer or
member.

Similarly, in the case of application for an affidavit of documents, the affidavit may be directed to be made by the officer

(*n*) See *Berkeley v. Standard Disc. Co.* (No. 2), C. A. 13 Ch. D. 97, reversing the decision of Fry, J., *S. C.* 12 *ib.* 295.

(*o*) *Swansea Corp. v. Quirk*, 5 C. P. D. 106.

(*oo*) *Berkeley v. Standard Disc. Co.* (No. 1), 9 Ch. D. 643 ; *S. C.* (No. 2), 13 *ib.* 97, C. A.

(*p*) *Ib.*

(*q*) *Lacharme v. Quartz, &c. Co.*, 1 H. & C. 134.

(*r*) *A.-G. v. Mercer's Co.*, 9 W. R. 83 ; see *Button v. S. E. R.*, W. N. 1868, 20.

(*s*) See *per* Cotton, L. J., 3 Q. B. D. 321, and the judgments of the LL. JJ. in *Anderson v. Bank of British Columbia*, 2 Ch. D. 644, 654.

(*t*) See *Berkeley v. Stand. Disc. Co.* (No. 2), 12 Ch. D. 295, 13 *ib.* 97.

or member (*u*). The summons for the affidavit may specify the person by whom it is desired that the affidavit should be made (*x*), or the master or judge may name a person to make it (*y*), or make the order generally for an affidavit by one or more officers or members (*z*). The officer or member, selected to make the affidavit, if he has not himself charge of the documents, must state what his sources of knowledge and means of information are, so as to enable the Court to see whether he is the proper person to answer, and it is not sufficient for him to state merely his belief that there are no other documents, as it may not be part of his duty to know anything whatever on the subject (*a*). He should state all he knows as to what has become of them (*b*), and he cannot escape an order for production (*i.e.*, *discovery*) on the ground that they are not in his separate and private possession, but belong to the corporation or other public body (*c*). He must show that he has *bond fide* applied for leave to produce them, and been refused (*d*).

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Sect. 1.

It was formerly necessary, where a foreign sovereign or government sued in this country, for the defendant to file a cross-bill for discovery, naming some officer as a co-defendant for the purpose of giving it; the same procedure may now be adopted, as in the case where discovery is sought from a corporation (*s*), (the only difference being that the sole mode of enforcing the discovery is by staying the proceedings) (*t*); that is, the defendant may apply to the foreign state to name some person from whom the discovery sought for may be obtained, and if the state refuses to name a proper person for that purpose, or the person so named makes default in giving the discovery, the Court will be justified in staying the pro-

Discovery from
officer of
foreign state.

(*u*) *Cooke v. Oceanic Steam Co.*, W. N. 1875, 220; *cf. Ranger v. G. W. R.*; 4 De G. & J. 74, and *Clinch v. Fin. Corp.*, L. R. 2 Eq. 271.

(*x*) *V. ante*, p. 160, as to the proper person to be selected. A form of summons is given in the Appendix (*post*, p. 195).

(*y*) *Cooke v. Oceanic Steam Co.*; see *Lacharme v. Quartz, &c. Co.*, 1 H. & C. 134.

(*z*) See the form of order made in *Rep. of Liberia v. Roye*, 1 App. Cas. 139, 140; *s.c. nom. Rep. of Liberia v. Imp. Bank*, L. R. 16 Eq. 179, 9 Ch. App. 569; and *Ranger v. G. W. R.*, *supra*.

(*a*) See *per* Lord Hatherley in *Rep. of Liberia v. Roye* (H. L.), 1 App. Cas. 139, 146; *per* Lord Cairns, L. C., *ib.* 142.

(*b*) *Ib.*

(*c*) *Clinch v. Fin. Corp.*, L. R. 2 Eq. 271; *Glyn v. Caulfield*, 3 Macn. & G. 463.

(*d*) *A. G. v. Mercer's Co.*, 9 W. R. 83.

(*s*) *Rep. Costa Rica v. Erlanger*, C. A., 1 Ch. D. 171.

(*t*) *Ib.*; see *per* Hall, V.-C., L. R. 20 Eq. 141.

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Sect. 1.

Action may be
stayed until
discovery
given.

ceedings until the defendant's demand is complied with (*u*), and in the last resort, dismissing the action, where the disregard of the order is pertinacious (*x*). In the case of a mere foreign corporation for trading purposes, as we have seen, the Court will assume that the secretary or other officers are under its control, for the purpose of giving discovery on its behalf (*y*), but in the case of a *body politic*, it must be shown that it has such an authority over the particular individual selected as to be in a position to compel him to give discovery (*z*). If the party seeking the discovery name an improper person for that purpose, the action will not be stayed until he has given it (*a*); the head of a foreign state is not, as a rule, a proper person to select to give discovery on its behalf on grounds of personal dignity (*b*). As a general rule, some person on the spot, and not a mere representative of the foreign state or corporation in this country, should be selected (*c*).

SECT. 2.—Discovery in Actions for the recovery of Land.

Sect. 2.

Right of
plaintiff to
interrogate
defendant.

THE right of a plaintiff in what is in substance an action of ejectment on the title to discovery has recently been the subject of much discussion (*d*). It was well established on general principles of discovery, (adherence to which is of peculiar importance in such cases, owing to the danger likely to arise to a person in possession of property from being compelled to disclose his title to it) (*dd*), that he was not entitled to enquire into the defendant's title or defence or the character of his possession, however little information might be given upon the point in the pleadings (*e*), but in a

(*u*) See *U. S. v. Wagner*, L. R. 2 Ch. App. 582; *Rep. of Liberia v. Imp. Bank*, *ib.* 16 Eq. 179; *S. C.* 9 Ch. App. 569; per Blackburn, J., 1 Ch. D. 174; *Republic of Peru v. Weguelin*, L. R. 20 Eq. 140.

(*x*) *Prioleau v. U. S.*, L. R. 2 Eq. 659; *U. S. v. Wagner*; *Republic of Peru v. Weguelin*; *Rep. of Liberia v. Roye*, H. L., 1 App. Cas. 189.

(*y*) *Ante*, p. 160 (*s*).

(*z*) *Per Wood, V.-C.*, L. R. 3 Eq. 732; *Prioleau v. U. S.*, 2 *ib.* 659.

(*a*) *Rep. Costa Rica v. Erlanger*, C. A., 1 Ch. D. 171.

(*b*) *Ib.*; *Prioleau v. U. S.*, *supra*.

(*c*) *Republic of Liberia v. Roye* (H. L.), *supra*.

(*d*) See *Lyell v. Kennedy* (H. L.), 52 L. J. Ch. 385, 8 App. Cas. 217, reversing the decision of the C. A., reported 20 Ch. D. 448.

(*dd*) *V. post*, p. 167.

(*e*) See *Horton v. Bott*, 2 H. & N. 249; *Bleasby v. B.*, 10 L. R. (Ir.) 60; Ord. XIX. r. 15. The right to withhold production of documents of title, even when pleaded, is expressly reserved to defendants by Ord. XXXI. r. 14 (*ante*, p. 124).

recent case (*f*) the Court of Appeal went further, and decided that the plaintiff was not entitled to any assistance from the Court by way of discovery, and consequently could *not interrogate the defendant at all*, even with the object of obtaining admissions in support of his own case, on the ground, (1.) that no discovery would have been obtainable in such a case in the Court of Chancery, and (2), that the Judicature Acts (*g*) did not confer any right to administer interrogatories in such a case (*h*). This decision, however, was reversed upon appeal by the House of Lords (on the former point only), where it was held that the plaintiff in ejectment has, as he always had, the same right of discovery as the plaintiff in any other action (*i*).

There is no rule that a defendant in such an action cannot interrogate the plaintiff (within the ordinary limits of discovery), but, in accordance with the general rule, he is not entitled to interrogate him as to the character or title in which, the links through which, or the deeds under which, he claims (*k*), except perhaps to the extent of ascertaining the *nature* of his title, where the defendant is in the position of a stakeholder (*l*), or as an equivalent for *particulars* (*m*). In the Common Law Courts a distinction was made in this respect in favour of a defendant who had had long possession, who was considered entitled to know the nature and character of the case made against him; *i.e.* in what capacity the plaintiff was claiming (there being no pleadings in ejectment) (*n*), so as to prevent him from being taken by surprise. Now

Right of
defendant to
interrogate
plaintiff.

(*f*) *Lyell v. Kennedy*, 20 Ch. D. 484.

(*g*) See Ord. XXXI. r. 1.

(*h*) The principle of the decision has been followed by a Divisional Court in *Hemmings v. Williamson*, 31 W. R. 336, and the decision itself by Chitty, J., in *Ford v. Daniel*, 47 L. T. 575 (reversed on appeal). The particular interrogatories disallowed in the principal case are not given but are stated to have been directed to obtaining information in support of the pedigree of the plaintiff's predecessors in title. The plaintiff had also applied for production of documents described by the defendant's affidavit as relating solely to the defence of his own title, which was refused by Bacon, V.-C., and, on appeal, by the same Court (20 Ch. D. 491).

(*i*) 52 L. J. Ch. 385, 8 App. Cas. 217 (*v. ante*, p. xxxiii.).

(*k*) *Prov. Ass. Co. v. M'Inerheny*, 18 W. R. 583, following *Ingilby v. Shafto*, 33 Beav. 31.

(*l*) See *Bellwood v. Wetherell*, 1 Y. & C. 211, 216 *seq.*, *per* Lord Abinger, C.B.; *per* Blackburn, J., L. R. 7 Q. B. 242; W. pl. 379 *seq.*

(*m*) See *Evelyn v. E.*, 42 L. J. 248; *ante*, pp. 36 *seq.*

(*n*) *Kettlewell v. Dyson*, 9 B. & S. 300; *per* Erle, C. J., 14 C. B. N. S. 211; *Pearson v. Turner*, 16 *ib.* 157. See also *Garle v. Robinson*, 4 Jur. N. S. 633; and *Bellwood v. Wetherell*, *supra*, in Equity.

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Sect. 2.

Defendant
must make
affidavit of
documents,
and produce
those relating
to plaintiff's
title.

that actions for the recovery of land are placed upon the same footing as regards the plaintiff's pleadings as other actions (*o*), and the defendant can obtain inspection of the documents referred to in those pleadings (*p*), the distinction seems to be no longer maintainable.

The defendant, however, is liable to make an affidavit of documents, or answer as to documents, there being no difference in this respect between such actions and ordinary ones (*q*), and agreeably to the general rule, the plaintiff is entitled to the production of all documents in the possession or power of the defendant which are *material to his case*. This was admitted in *Lyell v. Kennedy* (*r*), above cited, where Lord Justice Brett said, "I do not say that * * * in no case can a plaintiff in an action of ejectment ask for discovery of documents. If he alleged that the defendant had possession of his title-deeds, or of documents which supported his title, and it was not denied by the defendant (*s*) that they supported the plaintiff's title, the defendant ought to be compelled to produce them. If, however, the defendant answers on oath that the documents which are mentioned are documents which relate solely to his own title, I think that, in ejectment at all events, that is a sufficient answer" (*t*); and Jessel, M.R., said: "The utmost that the defendant could be asked to produce would be the deeds or documents relating to the plaintiff's title" (*u*). A party has a right to the production of deeds *sustaining his own title affirmatively*, but not of those which are not immediately connected with the support of his own title, and which form part of his adversary's. He cannot call for those which, instead of supporting his title, defeat it, by entitling his adversary. Those under which both claim he may have, or those under which

(*o*) *Philipps v. P.*, (No. 1) 4 Q. B. D. 127; *v. ib.*, as to what the statement of claim in such a case should contain.

(*p*) *V. ante*, p. 122.

(*q*) *Rumbold v. Fortleath* (No. 1), 3 K. & J. 44; *Quin v. Ratcliff*, 3 L. T. 363; *New British Co. v. Peed*, 3 C. P. D. 196; followed in *Wrentmore v. Hagley*, 46 L. T. 741. See *Lyell v. Kennedy*, H. L., 52 L. J. Ch. 385; *Daniel v. Ford*, (C A.), W. N. 1883, 52.

(*r*) 20 Ch. D. 491. The application was for *production* of documents disclosed by the affidavit of documents and alleged to relate solely to the defence of the defendant's title. On appeal to the House of Lords, leave was given to file a fresh affidavit in support of the claim of privilege (*v. ante*, p. xxxiv.).

(*s*) On affidavit.

(*t*) *Ib.* 492. See *Bennett v. Glossop*, 3 Ha. 578; W. pl. 203.

(*u*) *Ib.* See *Dunn v. Ferrior*, 18 W. R. 129.

he alone claims (*x*). Thus, an heir-at-law cannot, in that character, call for the general inspection of deeds in the possession of a devisee (*y*), or of deeds anterior to the will (for his title does not depend upon documentary evidence), but only of such as relate to or tend to show his own pedigree, or what the parcels of the estate claimed are (*z*), the question upon such an application being *what documents may assist the heir in proving his heirship* (*a*). On the other hand, a party claiming as *heir-in-tail* is entitled to the production of the deeds creating the entail, and also of those leading up to its creation, because they are assumed to be the common title of both parties, and of documents which will prove his descent (*b*).

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Sect. 2.

Right of heir-at-law to production.

Of heir-in-tail.

Before, however, an order ought to be made for the production of any title-deeds under the control of a person who is in the possession of land, when an attempt to get them is made by a person who has never been in possession, at least *the party applying ought to show some reasonable case which he believes to be true*, the production of title-deeds obviously exposing a man to many dangers to which he ought never to be made liable (*c*). A mere general allegation in an affidavit that the defendant has in his possession documents relating to the property claimed, which would be material evidence of the plaintiff's title, is not sufficient, being denied, to found an order for production upon (*d*), and an order for discovery will not be made *before defence*, unless the Court is satisfied, upon the pleadings or by affidavit, that the plaintiff has a reasonably well-founded cause of action (*e*). The rule that a plaintiff in ejectment cannot obtain discovery of the defendant's title-deeds depends on the circumstance that, where claims to the same land in fee simple are made by two different persons, they must be based on inconsistent

Caution to be exercised where defendant in possession.

(*x*) *Per* Lord Brougham, L. C., 1 Myl. & K. 91; *Lady Shaftesbury v. Arrowsmith*, 4 Ves. 70; see *Bennett v. Glossop*, 3 Ha. 578; *Rumbold v. Forteach* (No. 2), 3 K. & J. 748.

(*y*) *Ib.*

(*z*) *Wright v. Vernon*, 1 Drew. 344; *Bennett v. Glossop*, *supra*.

(*a*) See *per* Wigram, V.-C., 3 Ha. 581.

(*b*) See *per* Wood, V.-C., in *Rumbold v. Forteach*, 3 K. & J. 748, 750; *Wright v. Vernon*, *ubi supra*.

(*c*) See *per* Cotton, L. J., 4 Q. B. D. 140; *per* Jessel, M. R., 51 L. J. Ch. 411; *per* James, L. J., L. R. 7 Ch. App. 694; *per* Wood, V.-C., 3 K. & J. 750.

(*d*) *Philipp v. P.*, 27 W. R. 939; see *per* James, L. J., *ubi supra*.

(*e*) *Ib.*

CHAP. X. titles ; it cannot therefore be applied to the case of a claim
Sect. 2. of a right to minerals by the lord against the tenant of a manor where the defendant's right to the possession of the surface is not disputed, but the plaintiff relies upon a reservation of the minerals (*f*).

SECT. 3.—*Discovery in actions on policies of marine insurance.*

Sect. 3. Long before the Judicature Acts, the peculiarity of insurance business had given rise to a practice at common law of granting to insurers discovery to a larger extent than in ordinary business, and this ancient practice has not been superseded by those Acts (*g*). The discovery given in such cases is a very large, and, in some respects, exceptional one (*h*) ; for (1) no *onus* is thrown on the defendant seeking the inspection of showing himself to be entitled to it, as in ordinary cases, by affidavit or otherwise (*i*), and (2) discovery may be required, not only from the plaintiff himself, but also from *all persons interested in the ship or cargo, the insurance, and the proceedings* (*k*), by which is meant, *persons on the same side as the plaintiffs*, the people who are interested in the ship, freight, or cargo, and who are able to give information (*l*). Thus, where the plaintiffs were bare mortgagees, not in possession, of the vessel insured, an order was made for an affidavit of documents by the mortgagor, who had acted as managing owner, or his representatives, as well as by the plaintiffs and all persons interested (*m*). It seems, however, that if the plaintiff in such an action were to make an affidavit that no other persons are so interested, his

Discovery from plaintiffs in actions on marine policies.

And all persons interested.

(*f*) *Ponsonby v. Hartley*, LXXIV. Law Times, 208 (affirmed by the C. A., on a different ground) ; *v. ante*, p. xxxix.

(*g*) *Per Brett, L. J.*, in *China Steam Co. v. Commercial Ass. Co.*, C. A., 8 Q. B. D. 142, 145 ; *West of England Bank v. Canton Ins. Co.*, 2 Ex. D. 472. See *Rayner v. Ritson*, 6 B. & S. 888, and *Daniel v. Bond*, 9 C. B. N. S. 716, 724 (*a*). The practice was not recognised in Chancery, where discovery could only be obtained from the parties to the record. (See *Queen of Portugal v. Glynn*, 7 Cl. & F. 466 ; *Manchester Fire Co. v. Wykes*, 33 L. T. 142.)

(*h*) See, as to the reason, *per Cockburn, C. J.*, 35 L. J. Q. B. 61.

(*i*) *China, &c., Co. v. Commercial, &c., Co.* ; *Rayner v. Ritson*, 35 L. J. Q. B. 59.

(*k*) See the form of summons in such cases (*post*, p. 196) ; *China, &c., Co. v. Commercial, &c., Co.* ; *West of England Bank v. Canton Ins. Co.*, *supra*.

(*l*) See *per Jessel, M. R.*, 30 W. R. 225.

(*m*) *West of England Bank v. Canton Ins. Co.*, *supra*.

own affidavit of documents would be sufficient (n). (3) In cases of this description the discovery given is not limited to matters relating strictly to the questions in dispute between the parties. "Nothing," said Lord Abinger in *Janson v. Solarte* (o), "is more difficult to ascertain, and nothing more dangerous to limit, than the right of underwriters to discovery. It has been considered, at all times and in all countries, that in cases of this nature the underwriters are entitled, *not only to a discovery of all the circumstances attending the original contract, but to the whole history of the adventure and loss*. Therefore it is very difficult, and, perhaps, dangerous to limit the power of the underwriters in that respect. * * * With respect to the entries in the books, the general rule is, that the underwriter has a right to the inspection of *everything relating to the particular transaction in dispute*. If there be any doubt as to the purchase, or the shipment, or the value of the goods, or on any question as to false papers imposed on the underwriter, he has a right to the inspection of the books of the assured in relation to those individual matters, but not in relation to matters not connected with the transaction." Where the insurance is upon the ship alone, documents relating to the cargo may nevertheless, be ordered to be produced, as they may be very material, *e.g.*, by showing that the voyage was illegal (p).

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Sect. 3.

Extent of right
to discovery.

It may be made one of the terms of the order that there shall be a stay of proceedings until the discovery is granted, even when the order is for an affidavit by other persons than the plaintiff, but he will be relieved against such a stringent term, if he satisfy the Court that he has resorted to all reasonable, lawful, and practicable means in his power to produce the papers or cause them to be produced, and that it is absolutely impossible for him to comply with the order (q). If the plaintiffs swear that they are the only persons interested, or that they have tried to obtain documents from the other parties interested and failed, that will be sufficient, and their own affidavit of documents will suffice (r). A stay

Stay of pro-
ceedings may
be granted.

(n) See *China, &c. Co. v. Commere. Ass. Co.*, C. A., 8 Q. B. D. 142.

(o) 2 Y. & C., 127, 136 *seq.*

(p) *Per* Brett, L. J., 8 Q. B. D. 146.

(q) *China, &c. Co. v. Commercial Co.* The plaintiff might enforce the affidavit from such other parties under the C. L. P. Act, 1854, s. 48.

(r) *Per* Jessel, M. R., 45 L. T. 647; *West of England Bank v. Canton Co.*, 2 Ex. D. 472.

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Sect. 3.

of proceedings was refused where the plaintiff, who was the assignee of the cargo insured and of the policy, was required to obtain an affidavit of documents from the assignor, who was not a party to the action or within the jurisdiction of the Court or under the plaintiff's control, there being no suggestion of fraud (*s*).

SECT. 4.—*Discovery in actions for infringement of patents.*

Sect. 4.
Ordinary rules
of discovery
apply to
actions for
infringement
of patents.

Plaintiff
entitled to dis-
covery in lieu
of particulars.

Notwithstanding the statutory provisions for the delivery by the plaintiff in actions for the infringement of letters-patent of particulars of the breaches complained of, and by the defendant of particulars of any objections to the validity of the patent on which he means to rely, under pain of being precluded from giving any evidence thereof at the trial (*t*), the ordinary rules of discovery apply to such actions (*u*), and consequently, there is a right to deliver interrogatories by the plaintiff or the defendant, with reference to those very matters which ought to be covered by the particulars (*uu*). Thus, in addition to the particulars of the place or places of the alleged prior user of the patented article (*x*), the plaintiff, on making out a case for the discovery, may interrogate the defendant as to the names and addresses of the persons alleged to have used it, and also whether the machine in question is still in existence (*y*). The above decision, however, was given in an action in the Chancery Division, where it is not the practice as a rule to order the delivery of particulars, and it seems that in the Queen's Bench Division, at any rate, the information should be obtained in the shape of further and better particulars, except, perhaps, when it is necessary to interrogate for other purposes (*z*).

(*s*) *Fraser v. Burrows*, 2 Q. B. D. 624 (see *Queen of Portugal v. Glyn*, 7 Cl. & Fin. 466). In this case the order was for an affidavit by the parties for whom the policy was effected, the object being to get discovery from the assignor who was no longer a party interested (see the report in 46 L. J. Q. B. 501).

(*t*) See 15 & 16 Vict. c. 83, s. 41.

(*u*) *Birch v. Mather*, 22 Ch. D. 629; *Finnegan v. James*, L. R. 19 Eq. 72; *Crossley v. Tomey*, 2 Ch. D. 533.

(*uu*) *Ib.*

(*x*) See 15 & 16 Vict. c. 83, s. 41.

(*y*) *Birch v. Mather*, *supra*. In *Daw v. Eley*, 2 H. & M. 725, and *Bovill v. Smith*, L. R. 2 Eq. 459 (where similar discovery was refused), the statute does not appear to have been referred to (see *per* Malins, V.-C., 2 Ch. D. 539).

(*z*) *V. ante*, p. 36 (*p*). Such orders have in fact been made in numerous

The plaintiff is entitled to discovery of everything showing, or merely tending to show, the fact of the infringement (a), and the defendant cannot by denying the infringement refuse to give any discovery (b). He must answer all questions directed to prove the fact of infringement, although the effect of so doing may be *incidentally* to reveal his own process or mode of manufacture (c). Thus, he may be asked whether the articles manufactured or sold by him are not substantially identical with those patented by the plaintiff, or if not, in what particulars they differ therefrom, and by what method or process he manufactures them (d), or whether he uses any of the ingredients mentioned in the specification, or any additional ones, and whether the additional ones make any difference in the process, though he is not compelled to disclose the nature and quantities of the additions (e). Again, although a defendant will not be compelled, as a rule, to disclose before the hearing the names of his customers, yet he cannot refuse to do so if the information might lead to important discoveries in regard to the infringement of the patent by other persons (f); thus, in a recent case, the shippers of goods which were alleged to be stamped with a counterfeit of the plaintiff's trade mark were compelled, in an action for discovery, to disclose the names of the consignors and consignees of the goods with a view to taking proceedings against them, the plaintiffs being unable to arrive at the information in any other way (g). The Court will, however, protect the defendant from any improper and unnecessary disclosure of his secret, and will not enforce from him an oppressive and inquisitorial discovery (h). Thus, in a suit for infringing the plaintiff's patent for preparing a colouring matter, alleged to be a com-

CHAP. X.
Sect. 4.

Discovery by
plaintiff from
defendant.

Oppressive or
inquisitorial
discovery not
enforced.

cases in the Court of Chancery under the Statute, *e.g.* in *Flower v. Lloyd*, 45 L. J. Ch. 746.

(a) See *per Wood*, V.-C., 3 K. & J. 391; *Crossley v. Stewart*, 1 N. R. 426.

(b) See *Renard v. Levinstein*, 10 L. T. 94; *Foxwell v. Webster*, 2 Dr. & Sm. 250; *S.C.* 4 De G. J. & S. 77.

(c) *Ib.*; *Howe v. M'Kernan*, 30 Beav. 547. See *Kelly v. Wyman*, 20 L. T. 300.

(d) *Crossley v. Tomey*, 2 Ch. D. 533.

(e) *Renard v. Levinstein*, 3 N. R. 665; *Howe v. M'Kernan*, 30 Beav. 547.

(f) *Crossley v. Stewart*, 1 N. R. 426, distinguishing *De la Rue v. Dickinson*, 3 K. & J. 388.

(g) *Orr v. Diaper*, 4 Ch. D. 92. In *Carver v. Pinto Leite*, L. R. 7 Ch. App. 90, similar discovery was enforced.

(h) *Per Wood*, V.-C., 10 L. T. 94; see *per Hall*, V.-C., 4 Ch. D. 96. The plaintiff may be expressly prohibited from making known the information acquired by him (*v. ante*, p. 137, g).

CHAP. X.
Sect. 4.

bination of substances A, 'B, C., and D., where the defendant was required to state what quantities of those substances he used in his business, the names and addresses of the persons who supplied him with them, the manufactures of colouring matter carried on by him during the last twelve months, and all the substances which he had used in such manufacture, the defendant, stating in his answer the quantities of substance A. used by him, but denying that he had used any of the other substances, was excused from any further answer (*i*): and the defendant will not be compelled to disclose the nature and quantities of ingredients used by him in addition to those mentioned in the plaintiff's specification, though he must say whether he does use any such additional ingredients or not (*k*).

Discovery of
instances of
prior user.

All that the statute in terms requires the defendant to state in his particulars of prior user, and all that can be required by the order for such particulars, is the *place or places* where and the *manner* in which the prior user of the invention is alleged to have taken place (*l*); but, by the well-established practice in such cases the defendant is nevertheless bound to give full particulars, stating the *names and addresses* of the persons by whom, and the *dates* at which, such previous user is alleged to have taken place (*m*). The plaintiff is not entitled to obtain particulars of objections from the defendant before delivering particulars of breaches (*n*).

Postponing
discovery as
to account.

In accordance with its general practice of enforcing a full answer, where a defendant answered instead of putting in a plea, the Court of Chancery at one time compelled a defendant, even where the infringement was denied, to give discovery by answer of profits made by the sale or use of the article alleged to be an infringement, the names of customers, &c., and other particulars of his trade (*o*), which

(*i*) *Simpson v. Charlesworth*, 14 L. T. 699. See *Rolls v. Isaacs*, W. N. 1878, 37.

(*k*) *Renard v. Levinstein*, 10 *ib.* 94.

(*l*) See *Flower v. Lloyd*, 45 L. J. 746 (*S.C.* XX. Sol. Journ. 660).

(*m*) *Ib.* See *Birch v. Mather*, 22 Ch. D. 629; *Penn v. Bibby*, L. R. 1 Eq. 548; *Morgan v. Fuller* (No. 2), 2 *ib.* 297. See as to amending particulars of, or answers as to objections, *per* Jessel, M. R. L. R. 19 Eq. 73; *Daw v. Eley*, 1 *ib.* 38; *Penn v. Bibby*, *supra*; and as to the sufficiency of such particulars of answer, *Morgan v. Fuller*, *supra*; *Flower v. Lloyd*, XX. Sol. Journ. 860; *Plimpton v. Spiller*, *ib.* 859.

(*n*) *Finnegan v. James*, L. R. 19 Eq. 72.

(*o*) See *Swinborne v. Nelson*, 16 Beav. 416; *Hove v. M'Kernan*, 30 *ib.* 547; *Crossley v. Stewart*, 1 N. R. 426; *ante*, p. 27.

could afford no assistance in determining the question of infringement, and which would be obtained as a matter of course under the decree, in the event of the plaintiff succeeding (*p*), but latterly the practice was so far modified as to postpone discovery which *assumed* the fact of infringement until after the hearing (*q*). Accordingly, in an action against shippers for exporting goods marked with what the plaintiffs alleged to be their trade-mark, the infringement being denied, discovery was refused before the trial of the names and addresses of the manufacturers and purchasers of the goods, and of the prices at which they had been bought and sold, as being matters the discovery of which was not likely to assist the plaintiffs in making out their case at the hearing, and which might have been used in a manner prejudicial to the defendants in their trade (*r*), and, latterly, mere money accounts of profits, &c. were refused before the hearing (*s*). Since the Judicature Acts, as we have already seen (*ss*), there is a *discretion* as to requiring a defendant to answer as to the result of an account before the trial, especially as to an account of profits, as it would not help the plaintiff to get a judgment, and it would be oppressive to order it while his title is in dispute (*t*). Thus, where the question in dispute was which of the two parties was entitled to use a particular trade-name for their goods, the Court refused to compel the plaintiffs to set forth the yearly quantities of goods sold by them for a number of years past (*tt*). But where the infringement is admitted, the defendant cannot refuse to disclose the names and addresses of persons to whom he has sold the patented article, on the ground that they would thereby be exposed to legal proceedings (*u*).

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Discretion
since Jud.
Acts.

After an account of profits or an inquiry as to damages

After judgment for

(*p*) See *per* Wood, V.-C., 3 K. & J. 392.

(*q*) See *De la Rue v. Dickinson*, 3 K. & J. 388; *Foxwell v. Webster*, 4 De G. J. & S. 77; *Carver v. Pinto Leite*, L. R. 7 Ch. App. 90; *per* Lord Hatherley, L. C., 4 *ib.* 576.

(*r*) *Carver v. Pinto Leite*, *supra* (see on this case *per* Hall, V.-C., 4 Ch. D. 96); see *Lea v. Saxby*, 32 L. T. 731, and *Heugh v. Garrett*, 44 L. J. Ch. 305.

(*s*) See *De la Rue v. Dickinson*, 3 K. & J. 388; *per* Lord Hatherley, L. C., L. R. 4 Ch. App. 576. Distinguish *Crossley v. Stewart*, 1 N. R. 426.

(*ss*) *V. ante*, p. 28; *Parker v. Wells*, C. A., 18 Ch. D. 477; *Benbow v. Low*, C. A., 16 *ib.* 93, 98, *per* Jessel, M. R.

(*t*) See *per* Jessel, M. R., in *Parker v. Wells*, at p. 484, and as to such accounts generally, *ante*, p. 31.

(*tt*) *Benbow v. Low*.

(*u*) *Telley v. Easton*, 18 C. B. 643; *Murray v. Clayton*, L. R. 15 Eq. 115.

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account or
damages.

has been directed, the defendant may be required to disclose the names and addresses of all persons from whom he has received sums of money in respect of royalties or licenses to use the patented article (*x*), or the number of the patented articles made or sold by him since the date of the patent, together with the names and addresses of the purchasers (*y*). In prosecuting such an inquiry, the plaintiff is entitled to have from the defendant the fullest possible discovery (*z*), and the discovery necessary for the taking of the account will be granted, although an appeal against the judgment is pending (*a*). If a defendant who is charged with selling goods impressed with the plaintiff's stamp has kept no account of such sales, and is unable to say how many of such goods he has sold, the plaintiff may require him to say to whom he has sold those particular goods, and if he is unable to distinguish between the customers to whom he has sold goods so marked and others not marked, then (but not otherwise) to disclose the names of *all* his customers, to enable the plaintiff to investigate the matter for himself (*b*).

Right of
defendant to
discovery from
plaintiff.

The defendant is entitled to a full, fair, and distinct notice of the case intended to be made against him (*c*), and may interrogate the plaintiff as to the particulars of the infringement on which he relies (*d*). In such case the plaintiff may answer by reference to the statement of breaches contained in his pleadings (*e*). In support of the defence of want of novelty, he may interrogate the plaintiff as to the inventions described in the specifications of previous patents, and ask in what respect they differ from his (*f*), and generally, may ask all questions which are fairly calculated to show that the patent is not a good patent, or that what the plaintiff alleges to be an infringement is not an infringement (*g*). In a case of this description, the case of the

(*x*) Kerr on Injunctions, 437.

(*y*) *Murray v. Clayton* L. R. 15 Eq. 115; *Saxby v. Easterbrook*, *ib.* 7 Ex. 207; *Leather Cloth Co. v. Hirschfeld*, 1 H. & M. 295.

(*z*) See *per* Bacon, V.-C., L. R. 15 Eq. 118.

(*a*) *Saxby v. Easterbrook*, L. R. 7 Ex. 207.

(*b*) See *per* Wood, V.-C., 1 H. & M. 297.

(*c*) *Bailey v. Kynock* (No. 2) L. R. 19 Eq. 229; *Needham v. Oxley*, 1 H. & M. 248.

(*d*) *Hoffmann v. Postill*, L. R. 4 Ch. App. 673.

(*e*) *Ib.*

(*f*) *Ib.*

(*g*) *Per* Giffard, L. J., L. R. 4 Ch. App. 681. The nature and extent of the discovery which the defendant may exact from the plaintiff is shown in *Renard v. Levinstein* (No. 2), 11 L. T. 79.

defendant is, that the plaintiff's patent is invalid, and everything that is material to show that, is part of the defendant's case, and he is entitled to discovery as to all matters of fact which are or may be material to his case (*h*), though, in accordance with the general rule, he is not entitled to a discovery of the details of the plaintiff's evidence (*hh*). Thus, where the plaintiff's case was that he had used the defendants' trade-mark for his goods with the knowledge and consent of their predecessors in title, the plaintiff was not compelled to answer interrogatories as to the quantities of such goods sold by him in each year (*i*).

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The Court has also power, in such actions, at the instance of either party, to order an inspection, *i.e.*, an inspection of the instrument or machinery manufactured or used by the parties, with a view to evidence of infringement (not of books or documents, the inspection of which is otherwise provided for (*ii*)), and may give such directions respecting such inspection as it may think fit (*k*), including the taking of specimens or samples (*l*).

Inspection of
fabrics or
machinery.

The foundation of the jurisdiction in such cases is the necessity on the part of the applicant for the inspection for the purpose of proving his case (*ll*), and though the Court of Chancery showed greater readiness to allow inspection in such cases than the courts of common law, it was never considered as a matter of right, but of discretion to be exercised with regard to all the circumstances of the case (*m*). Before making the order the Court should be satisfied of two things; (1) that there really is a case to be tried at the hearing of the cause, and (2) that the inspection is of material importance to the party's case, as made out by his evidence (*n*).

Not granted
as matter of
course but
necessity must
be shown.

It must be essential for the purpose of enabling him to

(*h*) *Per Selwyn*, L. J. L. R. 4 Ch. App. 679; see *per Giffard*, L. J., *ubi supra*.

(*hh*) See *Benbow v. Low*, C. A., 16 Ch. D. 93; *v. ante*, p. 37.

(*i*) *Ib.*

(*ii*) *Vidi v. Smith*, 3 E. & B. 969.

(*k*) 15 & 16 Vict. c. 83, s. 42. See, as to the mode of applying for such an order, *ante*, p. 147, and for forms, *post*, p. 197. The order cannot be made in respect of property situated in a foreign country (*ib.*).

(*l*) *Russell v. Cowley*, Webst. 457; *Patent Type Co. v. Walter*, John, 727; *Flower v. Lloyd*, W. N. 1876, 169, 230; *v. ante*, p. 149.

(*ll*) *V. ante*, p. 148.

(*m*) See *per Giffard*, V.-C., 19 L. T. 46.

(*n*) *Ib.* See also *Amies v. Kelsey*, 22 L. T. Q. B. 84, and *Meadows v. Kirkman*, 29 *ib.* Ex. 205 (at common law).

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prove his case (o), and this necessity must appear upon the pleadings, or by affidavit (p). Thus, inspection will not be granted of the defendant's works or machinery, where an examination of the article itself alleged to be an infringement would decide the question (q). The inspection will be strictly limited to what the exigencies of the case require; thus, the alleged infringer will not be ordered to produce all the machines in his stock of every kind, but to verify on affidavit the several kinds of machines sold or exposed for sale by him, and to produce a specimen of each class for inspection (r). Inspection by an impartial expert may be ordered instead of by the party himself, as being a rival in trade (rr). Pending an appeal, the operation of the order will be stayed, if its immediate enforcement would render it nugatory (s).

Time for
making
application.

The application may be made by the plaintiff before defence (ss), and it has been said, even before delivery of a statement of claim, *where such inspection is necessary for the purposes of pleading* (t), but in a later case the Court of Exchequer, "without laying down any general rule," refused an application for leave to interrogate before declaring (u). It seems that the plaintiff is not entitled to discovery at that stage merely because he is unable to deliver particulars of breaches without it (x), but he will be allowed to amend his particulars if desired, after obtaining it (y).

A defendant will not be allowed inspection of the patented article before defence, in order to enable him to give particulars of his objections (z). The order may be made after judgment (a).

(o) *Batley v. Kynock* (No. 1), L. R. 19 Eq. 90.

(p) See, as to what the affidavit should contain, *Thomas v. Tillie*, 17 Ir. C. L. Rep. 783; *Shaw v. Bank of England*, 22 L. J. Ex. 26.

(q) *Batley v. Kynock*, *supra*.

(r) *Singer Co. v. Wilson*, 12 L. T. 140.

(rr) *Flower v. Lloyd*, XX. S. J. 703; W. N. 1876, 169, 230.

(s) *Ib.* 584, 703.

(ss) *Thomas v. Tillie*, 17 Ir. C. L. Rep. 783 (where it is stated that a similar application was granted in the Courts here).

(t) *Amies v. Kelsey*, 22 L. J. Q. B. 84, *per* Crompton, J.; *v. ante*, p. 147 (l). The application must be supported by affidavit showing the necessity (*ib.*).

(u) *Jones v. Platt*, 30 L. J. Ex. 365. See, however, *Jones v. Lee*, 25 *ib.* 241.

(x) *Ib.*

(y) *Ib.*

(z) *Crofts v. Peach*, 2 Hodgs. 110; *v. ante*, p. 147 (m).

(a) *Holland v. Fox*, 3 E. & B. 977.

CHAPTER XI.

MISCELLANEOUS.

SECT. 1.—*Discovery in the Court of Appeal.*

THE Court of Appeal, as having "all the powers and duties as to amendment *and otherwise* of the Court of First Instance" (a), has jurisdiction to order production of documents before it at the hearing of the appeal (b); in such a case notice should be given to the party in whose possession they are to produce them at the hearing, failing which application may be then made to the Court by motion (c).

CHAP. XI.
Sect. 1.

C. A. can
order discovery.

SECT. 2.—*Discovery on references to arbitration.*

The Court of Chancery would not grant discovery in aid of proceedings before purely voluntary tribunals of the party's own choosing, such as arbitrations (d), but, in the case of *compulsory* references by the Court itself, discovery was obtainable (e). In the case of references for inquiry and report under the Judicature Act, 1873 (f), if discovery is needed, application should be made (in the Queen's Bench Division) at chambers in the ordinary way, or (in the Chancery Division) to the Judge at chambers to whom the action is attached, as official referees have no jurisdiction to order discovery (g). Where the *action* has been referred for decision (h), the Court has no longer jurisdiction to order

Sect. 2.

Discovery
in aid of
arbitration.

(a) See Ord. LVIII. r. 5.

(b) *Benyon v. Godden*, C.A., W. N. 1877, 257; see *In re Nat. Funds Ass. Co.*, 24 W. R. 774.

(c) *Ib.*

(d) See *Re Angl. Austral. Bank*, 10 L. T. 369.

(e) *British Empire Shipping Co. v. Somerset*, 3 K. & J. 433.

(f) *V. ib.*, s. 56.

(g) *Dauvillier v. Myers*, 17 Ch. D. 346, settling the question raised in *Rowcliffe v. Leigh*, 4 Ch. D. 661.

(h) S. 57.

CHAP. XI. discovery, which should be provided for by the order of
Sect. 2. reference (i).

SECT. 3.—*Discovery in lunacy.*

Sect. 3. According to the established practice in lunacy, no person except the parties and those claiming under them may as of right inspect the proceedings in lunacy. To entitle any other persons to such inspection a case must be made out to the satisfaction of the Court (k).

Inspection of
the proceed-
ings in
lunacy.

As between rival claimants to the estate of the lunatic, each of them is entitled, on showing a *prima facie* title to the estate, to access to the title-deeds and other documents relating to such estate, which have been deposited with the master or registrar in lunacy, for the purpose of establishing his claim (l), and if successful therein to have them delivered out to him (m).

Inspection of
title-deeds,
&c.

Primâ facie
title must be
shown.

It is not enough to swear that the production of them is necessary for the establishment of the applicant's case, but a *prima facie* title to the estate must be shown (n). The Court requires *prima facie* evidence of an interest in the documents, because they ought not to be open to the inspection of strangers, who have no shadow of interest in them; but any *prima facie* case which makes it reasonably probable that the documents may contain something to support the applicant's case is sufficient (o). Thus, inspection of documents relating to the lunatic's pedigree and estate was allowed to a person claiming to be his heir-at-law, although it was sworn on the other side, and not contradicted, that the estate had descended to the lunatic from his mother, and that the applicant was no relation to the mother, on the ground that the documents

(i) *Penrice v. Williams*, 31 W. R. 496; *semble*, an action for discovery would lie (*V. ante*, p. 3).

(k) *Re Smyth*, C. A. (No. 1), 15 Ch. D. 286; *re Wood*, 4 De G. J. & S. 134. See *Tyas v. Brown*, 42 L. T. 501; *Vivian v. Little*, lxxv. L. T. 108.

(l) See *re Ferrior*, L. R. 3 Ch. App. 175; *re Smyth* (No. 1), *supra*; *re Smyth* (No. 2), 16 Ch. D. 673; *Ex parte Clarke*, Jac. 589.

(m) See *re Pearson*, 1 Coop. Pr. Cas. 314.

(n) *Re Smyth* (No. 1); *re Wood*, *supra*.

(o) *Per Cotton*, L. J., in *re Smyth* (No. 2.), C. A., 16 Ch. D. 673, 674.

might, nevertheless, contain something to show that the descent ought to be traced from the lunatic himself (*p*). CHAP. XI.
Sect. 3.

Upon the application of the next-of-kin of a lunatic for the inspection of securities deposited by him with a third person, in order to obtain the Master's report as to the lunatic's property and the appointment of a committee, the Court ordered that the Official Solicitor in Lunacy should inspect and schedule them (*q*). Inspection
by official
solicitor.

Application must be made by petition to the Lord Chancellor or the Judges for the time being intrusted with the care and commitment of the custody of lunatics and their estates (*r*), and must be supported by an affidavit verifying the petitioner's title to the lunatic's estate (*s*), which may be made either by the petitioner himself or by his solicitor (*t*). Liberty to take copies or extracts of the documents may be refused, or reserved for a further application (*u*). Application to
be made by
petition.

SECT. 4.—*Discovery in election petitions.*

In a parliamentary election petition, neither the Court nor a Judge at Chambers has power to order interrogatories to be administered to, or discovery of documents to be given by a sitting member (*x*), under ss. 2 and 26 of the Parliamentary Elections Act, 1868 (*y*), or the 44th rule of Michaelmas Term, 1868, as the principle, practice, and rules on which committees of the House of Commons have heretofore acted in dealing with election petitions (*z*) (where discovery from the sitting member was a thing unheard of), are to be observed by the Court and Judge in the case of election petitions under the Act, unless and until altered by any rules made thereunder (*a*). The early cases, therefore, in Sect. 4.
No discovery
from sitting
member.

(*p*) *Ib.* Similar inspection had been previously allowed to the rival claimant *ex parte maternâ* (*re Smyth*, No. 1. 15 *ib.* 286).

(*q*) *Re Campbell*, C. A., 13 Ch. D. 323.

(*r*) See Jud. Act, 1875, s. 7. Such applications have been recently made to the division of the Court of Appeal which hears appeals from the Chancery Division.

(*s*) See *re Smyth* (No. 1), 15 Ch. D. 286; *re Wood*, 4 De G. J. & S. 134.

(*t*) *V. ib.*

(*u*) See *Ex parte Clarke*, Jac. 589; *re Ferrior*, L. R. 4 Ch. App. 175.

(*x*) *Wells v. Wren* (Wallingford Election petition), 5 C. P. D. 546; *Moore v. Kennard* (Salisbury petition), 10 Q. B. D. 290.

(*y*) 31 & 32 Vict. c. 125.

(*z*) *Ib.* s. 26.

(*a*) *Ib.* s. 25.

CHAP. XI. which such discovery was ordered, are no longer law (*b*),
Sect. 4. the attention of the Judges who decided them not having
 been drawn to s. 26 of the Act (*c*).

Discovery
 under Ballot
 Act, 1872.

Not granted
 as matter of
 course.

Under the Ballot Act, 1872 (35 & 36 Vict. c. 33), sched. I., rs. 40 and 41, inspection may be obtained by the petitioner, from the Clerk of the Crown in Chancery, of ballot-papers and counterfoils, relating to the election, on satisfying the Court or Judge (at Chambers) (*d*) by affidavit that such inspection is required for the purpose of the petition impeaching the election (*e*). The object of the Act was to preserve secrecy as to the way in which an elector has voted, and some special ground must be shown for violating this secrecy (*f*). It is not enough that inspection is asked for. The Court must be satisfied by evidence on oath that it is reasonably and *bond fide* required for that purpose. The grounds alleged for requiring it must be looked at (*g*). Accordingly, inspection of the ballot-papers and counterfoils will not be granted for the purpose of showing the persons who voted, where the same information would be afforded by the marked register of voters (without the same risk of disclosure of how they voted), which is open to public inspection under s. 42 (*h*).

But where it was alleged that the returning officer had wrongly rejected certain ballot-papers, upon grounds *apparent on the face of them*, inspection was ordered, as being absolutely necessary to enable the petitioner to prosecute his case (*i*). The clerk who has the custody of the documents relating to the election cannot refuse inspection of any of those which are made *publici juris* by the above section, on the ground that they are sealed up in one package with documents for the inspection of which an order is neces-

(*b*) The *Coventry Petition*, 19 L. T. 742: the *Staffordshire Petition*, 20 *ib.* 237; the *Bewdley Case* (not reported).

(*c*) *Wells v. Wren*, *supra*. In this case the Court (Lord Coleridge, C. J. and Grove, J.), expressed a doubt whether the election Judges could make a rule for discovery.

(*d*) *I.e.*, a Divisional Court of the Queen's Bench Division, or one of the judges upon the election rota, or an ordinary judge at chambers (see r. 44 of Mich. term, 1868).

(*e*) See *Stowe v. Jolliffe*, L. R. 9 C. P. 446; the *Tyrone Election Petition*, Ir. Rep. 7 C. L. 190. A form of summons is given in 43 L. J. C. P. 174.

(*f*) *Stowe v. Jolliffe*.

(*g*) *Per Denman, J.*, *ib.* 459.

(*h*) *Stowe v. Jolliffe*, *supra*.

(*i*) The *Tyrone Election Petition*, Ir. L. R. 7 C. L. 190. See a form of order *ib.* 192.

sary (*k*), and he may be compelled to produce them by a mandamus or a simple rule of Court. **CHAP. XI.**
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It seems that the application should not be made before presentation of the petition (*m*), as the inspection was not intended to enable the applicant to fish for a case, but only to enable him to prove a *bond fide* case (*n*). *Semble*, not
before
petition.

(*k*) *Stowe v. Jolliffe*, L. R. 9 C. P. 446.

(*m*) *Manchester Election Petition*, 54 Law Times, 53.

(*n*) *Ib.*

CHAPTER XII.

COSTS.

CHAP. XII. THE rule in Chancery was, that a plaintiff seeking *discovery only* always paid the costs of it (*a*), the defendant upon putting in a sufficient answer being entitled to receive his costs by an order of course at the Rolls (*b*). Similarly, persons, who are made defendants to an action for the purpose of discovery only (*c*), on putting in sufficient answers, are entitled to be dismissed from the action with costs (*d*).

Costs of action
for discovery
only.

Costs of
interlocutory
discovery.

Under the present practice, the costs *of and incident to all proceedings in the High Court*, including applications for discovery, the order made thereon, and of the answer, examination, inspection, or other discovery which is consequent upon that order, are in the discretion of the Court (including a Judge or Master), and may either be dealt with at the time or be reserved until the hearing (*e*). If not so dealt with, they are in the discretion of the Judge at the trial, unless in the case of actions tried by a jury, when they follow the event, unless otherwise ordered (*f*), and being discretionary, no appeal lies from an order as to such costs, except by leave of the Judge who makes it (*g*).

Costs of inter-
rogatories and
answers.

The costs of interrogatories and the answers thereto are usually treated on taxation as part of the "costs in the cause," which follow the event (*h*), and this is the case with the costs of the discovery given by an officer or member on

(*a*) See Dan. 1411 ; Morgan's Law of Costs, pp. 214 *seq*.

(*b*) *Ib*.

(*c*) *V. ante*, p. 11.

(*d*) *Bull v. West London School Board*, 34 L. T. 674.

(*e*) Ord. LV. ; *Abud v. Riches*, 2 Ch. D. 528 ; *Vicary v. G. N. R.*, 9 Q. B. D. 168 ; *Mitchell v. Darley Coll. Co.*, 10 *ib*. 457.

(*f*) Ord. LV.

(*g*) Jud. Act, 1873, s. 49 ; *Mitchell v. Darley Coll. Co.*, *ubi supra*.

(*h*) See *Baines v. Bromley*, 6 Q. B. D. 197, 200.

behalf of a corporation or company (i). The Court may, CHAP. XII. however, in adjusting the costs of the action, *at the instance of either party*, inquire or cause inquiry to be made into the propriety of exhibiting the interrogatories, and if it is the opinion of the taxing-master or of the Court or Judge that such interrogatories have been exhibited *unreasonably, vexatiously, or at improper length*, the costs occasioned by the interrogatories and the answers thereto are to be borne by the party at fault (k). Thus, the costs of a further answer, unnecessarily and vexatiously required, have been ordered to be paid by the plaintiff (l). Again, the Judge before whom the action is tried, or a divisional Court, has power under Order LV. to order that any particular costs shall not follow the event of the action, and to allow them to the unsuccessful party, so that, although the costs of interrogatories administered in the action and answers, as a rule, follow the event, a party who succeeds by means of them in establishing his claim to a substantial amount, though unsuccessful in the main result, might be allowed the costs of them (m). In the Common Law Courts, the costs of administering interrogatories have been disallowed where the answer had not been used at the trial (n), but in a Chancery case, the cost of interrogatories which, though prepared, were not filed in order to save expense, were allowed on taxation (o).

The general rule is, that whenever a party has by his own fault, however venial, occasioned expense, he must pay the costs (p); accordingly, the costs of an application for leave to deliver interrogatories, where the time for doing so of right has been suffered to elapse, may be ordered to be paid by the applicant (q).

The costs of applications to strike out interrogatories as scandalous or to expunge scandalous matter from answers or affidavits, or to take off the file irregular or evasive answers or matter.

(i) *Berkeley v. Standard Discount Co.*, C. A., 13 Ch. D. 97.

(k) Ord. XXXI. r. 2, cf. Rules S. C. 1875 (costs), Ord. VI. r. 18.

(l) *Cocks v. Stanley*, 6 W. R. 45.

(m) See *Baines v. Bromley*, 6 Q. B. D. 197, 200, *per* Pollock, B.

(n) *Ridley v. Sutton*, 1 H. & C. 741.

(o) *Davies v. Marshall*, 1 Dr. & Sm. 564.

(p) *Per* Kindersley, V. C., in *Dakins v. Garratt*, 4 Jur. N. S. 579. See *Abud v. Riches*, 2 Ch. D. 528.

(q) *Ib.* But see *London, etc., Ins. Co. v. Davies*, 5 Ch. D. 775, where they were made costs in the cause.

CHAP. XII. prolix and impertinent affidavits of documents, must be paid by the party in fault; in the former case, costs are allowed as between solicitor and client (*r*), even in cases between husband and wife (*s*). The usual form of order is for the payment of the costs "of and incident to" the answer or affidavit and of the application (*t*), which include the costs of taking a copy of the objectionable document (*u*).

Costs of answer.

The costs of putting in separate answers will not be allowed, where there is no justification for such a course, *e.g.*, in the case of partners who are sued as such and interrogated as to their joint transactions (*x*), and the officer or member of a corporation or company, who gives discovery on its behalf, should not put in his answer by a separate solicitor, but should act by the solicitor of the corporation or company (*y*).

Application for answer, or further answer.

The costs of, and incidental to applications for an answer or further answer are in the discretion of the Court or Judge, and should be provided for by the order made thereon (see Order LV.), or, *semble*, applied for subsequently (*z*), as, otherwise, they cannot be recovered as "costs in the cause" (*a*). The rule as to the costs of further answers or examinations has already been given (*b*). They may be ordered to be paid *immediately*, and it is said to be highly important for keeping the business of the Court regular, that such costs should be finally disposed of at once (*c*); in the Queen's Bench Division, it is usual to make them costs of the successful party "in any event" (*d*). In the Court of Chancery, where the defendant *submitted to exceptions for insufficiency* (the modern substitute for which is a written statement of the answers objected to as insufficient), before they were set down for hearing, he had to pay the plaintiff 20s. costs (*e*).

Costs of further answer.

(*r*) *Christie v. C.*, L. R. 8 Ch. App. 499.

(*s*) *Pearse v. P.*, 29 L. T. 453.

(*t*) See *Walker v. Poole*, 21 Ch. D. 835.

(*u*) *Read v. Barton*, 3 K. & J. 166.

(*v*) *Bull v. West London School Board*, 34 L. T. 674; Consol. Ord. XL.

r. 12.

(*y*) *Berkeley v. Standard Co.*, C. A., 13 Ch. D. 97.

(*z*) See *Betts v. Rinnell*, W. N. 1866, 22; *Abud v. Riches*, 2 Ch. D. 528.

(*a*) *V. ante*, p. 100.

(*b*) *V. ante*, p. 101.

(*c*) See *Thomas v. Rawling* (No. 2), 27 Beav. 375, Romilly, M. R.; Ord. XL.

r. 12.

(*d*) See *Vicary v. G. N. R.*, 9 Q. B. D. 168.

(*e*) Ch. Consol. Ord. XL, r. 13.

The costs of making the affidavit of documents are invariably treated as costs in the action (*f*), unless it is otherwise provided by the order directing the affidavit to be made. The costs, however, of any unnecessary matter contained in such an affidavit, or of any improper length in the affidavit, may be disallowed at the hearing of the case or on taxation (*g*).

CHAP. XII.

Costs of Affidavits of Documents.

According to the practice of the Court of Chancery, the party producing was not entitled to his solicitor's costs of the production as costs in the cause (*h*), whether made at the Record and Writ Clerk's Office or at the office of his own solicitor (which was merely a matter of indulgence and convenience granted him), while in the Common Law Courts where the practice of ordering production at a public office was (as before stated) unknown, the costs of production at the solicitor's office were allowed, such production being a matter of right not of favour (*i*). Probably, some new rule will be framed to render the practice uniform as to the place, and consequently the costs, of production in all divisions, and production will be directed in all cases to be made either at the central office or at a district registry as the case may be (*k*). The schedule of costs in the Rules of the Supreme Court, June, 1875 (costs), contains no allowance for attendances either on inspecting documents or producing them for inspection, except where such inspection or production takes place under Ord. XXXI. r. 14 (*l*), and no costs are to be allowed of such notice or inspection unless good and sufficient reasons for giving such notice and making such inspection can be shewn (*m*).

Costs of production.

The costs of inspection are within the discretion of the Court or Judge making the order therefor (*n*), but if not provided for therein, the inspecting party cannot recover them, or the costs of taking copies, from his adversary as costs in the cause, it not having been the practice to allow such costs in the Court

Costs of inspection.

(*f*) Rs. S. C. Apr. 1880, Sched. Form H. 14.

(*g*) *Ib.* 1875, Ord. VI. r. 18.

(*h*) *Brown v. Sewell*, C. A., 16 Ch. D. 517.

(*i*) *Ib.*

(*k*) See *per* Jessel, M. R., *ib.* 519, and *per* Lush, L. J., *ib.* 521.

(*l*) *V. ante*, pp. 122, *seq.*

(*m*) *Ib.*, Ord. VI. (Special Allowances, etc.) r. 15.

(*n*) Ord. LV. Under *exceptional* circumstances, the costs might be made costs in the cause, or of one or other of the parties in any event (see *per* Brett, L. J., L. R. 7 C. P. 355).

CHAP. XII. of Chancery (o), and there being nothing in the Judicature Acts to alter the practice (p), except where the inspection takes place under Order XXXI. r. 14 (q). The expenses of an accountant or other special agent employed to make such inspection may, however, be recovered by the party employing him, if successful, as expenses for qualifying a witness to give evidence (r). The costs of the application for an order for inspection are usually treated as costs in the cause (s); the applicant may, however, even though successful, be ordered to pay the costs, unless he has previously applied for inspection and been refused (t). The costs of inspection of property are in the discretion of the Judge and must be provided for by the order, as otherwise they cannot be recovered by either party (u). They are usually ordered to be paid by the inspecting party (x).

Cost of application for inspection.

Inspection of property.

Applications for extension of time.

The costs of applications for an extension of time for answering or taking any other proceedings are in the discretion of the taxing-master, in the absence of an order by the Court or a Judge directing by whom they are to be paid (y). In practice, the costs of one such application are usually allowed as costs in the cause (z).

Applications for attachment.

Where the application is made justifiably and *bonâ fide*, the applicant is entitled to the costs of the application, even though the writ is not actually issued (a). If briefs are delivered prematurely by the applicant, the costs of them will be disallowed (b). The costs of writs of attachment are, as we have seen, in the discretion of the Court, and should be asked for on the application for the issue of the writ (c).

(o) See *Flockton v. Peake* (No. 2), 12 W. R. 1023. In the Common Law Courts, the inveterate rule was that the applicant paid the costs of the inspection (*Republic of Peru v. Weguelin*, L. R. 7 C. P. 352), though the costs of the application were usually made costs in the cause (ib).

(p) *Brown v. Sewell*, C. A., 16 Ch. D. 517. The statutory form of order for inspection contains no direction upon the point.

(q) *V. ante*, p. 185.

(r) Rs. S. C., June, 1875 (costs), Ord. VI. r. 8; *Mackley v. Chillingworth*, 2 C. P. D. 273; *Turnbull v. Janson*, 3 ib. 264.

(s) *V. ante*.

(t) See *The Memphis*, L. R. 3 A. & E. 23.

(u) See *Mitchell v. Darley Coll. Co.*, 10 Q. B. D. 457.

(x) *Ib.*; *ante*, p. 148.

(y) Rs. April, 1880, r. 65.

(z) Cf. Rs. S. C. (costs) 1875, Ord. VI. r. 22, annulled by the previous rule.

(a) *Thomas v. Palin*, C. A., 21 Ch. D. 360.

(b) *Ib.*

(c) *Abud v. Riches*, 2 Ch. D. 528; *ante*, p. 155.

Appeals to the Court of Appeal upon interlocutory matters, **CHAP. XII.**
such as questions of discovery, are entertained only as to Costs of
matters of principle, unless where the Court below has not appeals to C. A.
been unanimous (*d*), and in a recent case, in order to discourage, as was said, such appeals, and also because the appellant was not wholly successful, the Court gave no costs of the appeal (*e*).

(*d*) See *per Cur. Eade v. Jacobs*, 47 L. J. Ex. 74.

(*e*) *Ib.*

APPENDIX.

INTERROGATORIES.

In the High Court of Justice.

18 . No. . Appendix.

Division.

Between A. B.

Plaintiff,

and

C. D.

Defendant.

Interrogatories [*or further interrogatories*] exhibited on behalf of Interrogator the — for the examination of the — [delivered pursuant to order] dated the —.

1. Did not, &c.

2. Has not, &c., &c.

[*Add if necessary.*]

The — is required to answer the interrogatories numbered — and the — is required to answer the interrogatories numbered — (a).

Delivered, &c.

Interrogatory as to execution of a document.

Was not a deed of the nature set forth in the — paragraph of the statement of claim duly executed by and between the parties therein stated, or some or one and which of them, and does not the said deed bear the date, and is it not to the purport or effect therein set out, or of some and what other date, or to some and what other purport and effect? (aa) [If you desire to inspect the said deed before answering, you are at liberty to do so.] (b)

As to contents of a document.

Look at the document annexed hereto, marked — and purporting to be a copy of [*describe document*] the original of which shall be produced to you if desired (bb), and say whether the said [document] was

(a) This note is only necessary where there is more than one plaintiff or defendant (see *Lynch v. Lescage*, 1 Ha. 626).

(aa) See Dan. 306.

(b) This should be added if the document is in the interrogating party's possession or power (*V. ante*, p. 83).

(bb) *V. supra*.

Appendix. not written or signed by you or by your authority or with your knowledge and consent.

Another form.

State whether you wrote and sent any letter or letters to —, and if so, when, making the statements contained in the — paragraph of the statement of claim [*or, hereinafter set out and marked —*], or any and which of them, or any and which part of any and which of the said statements, or to the same and what purport and effect as the said statements, or any and which of them, or any and which part of any and which of them. Set out as fully as you can also what your said statement or statements were, and if you have a copy or copies of any such letters, make a copy thereof an exhibit to your answer (c).

Answer to Interrogatories.

[Formal part as in preceding form.]

Answer.

The answer [*or, further answer*] of the — to the interrogatories [*or the further interrogatories*] exhibited for his examination by the —

In answer [*or, further answer*] to the said interrogatories, I — the — make oath and say [*or, do solemnly and sincerely declare and affirm*] (cc) as follows:—

1. To the 1st interrogatory I say that, &c., &c. (d).

Sworn [*or, affirmed*], &c.

Filed &c.

Objections to answer Interrogatories.

Scandal.

Irrelevancy.

Not put *bond fide*.

Not immediately material.

Party's own case only.

[Except as aforesaid] I object to answer the — interrogatory [*or as the case may be*] on the ground that it is scandalous, *or*, that the matters therein inquired into are irrelevant and immaterial to the matters in question in this action, and would not in any way prove or assist the case of the [*party interrogating*], *or*, that it is not put *bond fide* for the purpose of obtaining discovery in this action, but for the purpose of [*state the circumstances*], *or*, that the discovery sought is not sufficiently material at this stage of the action, and is not necessary for the trial thereof, [and that the — is not entitled thereto until he has obtained judgment in his favour], *or*, that the right thereto depends upon the determination of the issue, whether [*state particular issue or question in dispute*], *or*, that it is desirable that the issue *or* question whether &c., should be decided before determining upon the right to such discovery (e), *or*, that the matters therein inquired into relate solely to the case made by me and do not in any way advance or tend to advance the case of the — [*party interrogating*], *or*, that it relates to matters of law only, *or*, that the matters inquired into are matters

(c) See *Dalrymple v. Leslie*, 8 Q. B. D. 5.

(cc) *V. ante*, p. 77, and Consol. Ord. (prelim.) r. 10 (6). It should be stated to what denomination the party belongs or belonged.

(d) Jud. Act, 1875, Sched. 1, App. B. Form 8.

(e) See Ord. XXXI. r. 19. Other forms of this objection will be found in L. R. 13 Eq. 608, 7 Ch. D. 440, 16 *ib.* 94, and 50 L. J. Ch. 36. See also *post*, p. 193.

of state which cannot in my opinion be disclosed without injury to the public interest (*f*), or, that all the knowledge and information which I possess in respect of the matters thereby inquired into is derived from professional and confidential communications made to me by A. B. in my capacity as his solicitor [or, as the clerk or agent of his solicitor], for the purpose of obtaining my legal advice or assistance thereon [or, of maintaining or defending this action], and not otherwise (*g*), or, from information procured by my solicitors or their agents in and for the purpose of defending my title to the hereditaments in dispute (*gg*), or, that to the best of my knowledge and belief the answer might criminate, or tend to criminate me and expose me to an indictment for [*as the fact may be*] (*h*), or, render me liable to forfeiture and penalties under the statute [*state the circumstances*], or, to a forfeiture of my estate and interest (*i*).

Appendix.

Public policy.

Professional confidence.

Self-crimination.

Objection to answer Interrogatory as to Documents.

I object to answer the — interrogatory on the ground that the discovery thereby sought might be more conveniently and cheaply obtained by means of an application for an affidavit of documents, which I am able and willing to make (*k*).

Affidavit of Documents.

[*Heading as in No. 1.*]

I, the above-named — make oath and say as follows:—

1. I have in my possession or power the documents relating to the matters in question in this action set forth in the first and second parts of the first schedule hereto. Affidavit of

2. I object to produce the said documents set forth in the second part of the said first schedule hereto.

3. That [*here state upon what grounds the objection is made, and verify the facts as far as may be*].

4. I have had, but have not now, in my possession or power the documents relating to the matters in question in this action set forth in the second schedule hereto.

5. The last-mentioned documents were last in my possession or power on [*state when*].

6. That [*here state what has become of the last-mentioned documents, and in whose possession they now are*].

7. According to the best of my knowledge, information, and belief, I have not now, and never had in my [exclusive] (*l*) possession, custody, or power, or in the possession, custody, or power of my solicitors or agents, solicitor or agent, or in the possession, custody, or power of any other persons or person on my [exclusive] behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question

(*f*) See *Kain v. Farrer*, 37 L. T. 469.

(*g*) See 6 Jur. N. S. 478.

(*gg*) See *Kennedy v. Lyell*, C. A., 48 L. T. 455.

(*h*) See, as to when it is necessary to verify this objection, *ante*, pp. 46 seq.

(*i*) See L. R. 4 Eq. 327, 332 (liability to confiscation of estates).

(*k*) *Hoffmann v. Postill*, L. R. 4 Ch. App. 673.

(*l*) *V. post*, *Statement of joint possession*.

Appendix. in this action, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the said first and second schedules hereto.

Schedule 1.

Part 1. [*Set out documents intended to be produced.*]

Part 2. [*Documents not intended to be produced which may either be described by a detailed schedule, or where the protection claimed applies to all the classes of documents, by a reference to their numbers as included in an earmarked bundle (m).*].

Schedule 2.

[*Documents parted with.*]

Sworn, &c. (n).
Filed, &c.

Statement of joint possession of documents.

Statement of
joint possession.

I have in my possession jointly with A. B., who is my partner [*or as the case may be shewing nature of joint ownership*], the following documents, viz. [*or, the documents mentioned in the — schedule hereto*], and I am not able to produce the same or any of them without the consent of the said A. B., but I am willing to produce the same if the said A. B. consents thereto (o). *Or*, I further say that in addition to the documents above-mentioned, there are in the possession or power of A. B., of —, the following documents relating to the matters in question, viz. —. The said A. B. holds the said documents as solicitor [*or, agent*], not only for myself, but also for C. D. [*or as the case may be*] of — who is entitled to a moiety of the property to which they relate [*state nature of interest in documents*], and who objects to produce the same. Under the above circumstances I submit that they are not in my possession or power, and I therefore object to produce, and am in fact unable to produce them (p).

Form to be used when documents have been sealed up (q).

Statement as
to documents
sealed up.

I have sealed up parts of the documents referred to in the first part of the said first schedule, and I swear that the said portions sealed up do not contain any entry or memorandum relating to the matters in question in this action or any of them, or which would assist, or tend to assist the — in maintaining [*or, defending*] this action (r).

(m) *V. ante*, p. 117. For a form to be used, when further documents are subsequently discovered, see L. R. 14 Eq. 581.

(n) Where the affidavit is made on behalf of an artificial person, or otherwise vicariously (*v. ante*, pp. 110, *seq.*), the above form must be altered accordingly, and instead of the first person the affidavit must be made in the *name of the party* from whom it is called for. The first schedule is only necessary where the deponent objects to the production of some of the documents; if he denies having any, he must depose as in paragraph 7, omitting the final words of exception.

(o) See *Bovill v. Cowan*, L. R. 5 Ch. App. 495; *Kettlewell v. Barstow*, 7 ib. 312. It is sufficient to state the joint possession and consequent objection to produce (*Kearseley v. Philips*, C. A., 10 Q. B. D. 465).

(p) See 30 Beav. 282.

(q) This form may be added to paragraph 1 of the affidavit.

(r) See L. R. 7 Ch. App. 90; 3 Myl. & Cr. 634 (for a form where parts of particular books are sealed up).

Objections to produce documents.

I object to produce the said documents [or, except as sealed up] on the ground that they [or, such parts thereof as I have caused to be sealed up] relate exclusively to my own title or case(s), and do not to the best of my knowledge, information, and belief contain anything impeaching my case or forming or supporting the [applicant's] case or title, and are not in any manner material to the case of the [applicant] as to any matter in dispute between us in this action(t), or, on the ground that they are professional and confidential communications which passed between me [and my agents] and my solicitor or his clerks and agents [or, my counsel] for the purpose of getting legal assistance and advice in maintaining or defending this action, or with reference to the matters which are now in dispute in this action(u), or in apprehension of a claim or dispute arising in respect of such matters, or cases submitted to counsel after the matters in dispute in this action had arisen with reference thereto(x), or in apprehension that some dispute or claim might arise with respect to such matters, with their opinions thereon, or, that they contain information which was obtained merely for the purpose of being laid before my solicitor [or, counsel] for his advice and consideration in this action [or, of enabling him to maintain or defend this action or the action of — v. — relating to the same subject-matter](y). *Forms of objection on the ground of "Want of immediate materiality," and "Tendency to criminate," can easily be compiled from those of objections to answer (ante, pp. 190—1). See also L. R. 7 Ch. App. 691 for a form of the former objection.*

Appendix.

Objections to produce documents.

Relate solely to own title or case.

Professional confidential communications.

Notice to produce documents for inspection.

[*Formal heading as usual.*] Take notice that the — requires you Notice to produce for his inspection at the office of your solicitor (z) the following documents referred to in your statement of — [or as the case may be] dated the — [describe the documents of which inspection is sought].

Dated the —.

Yours, &c.

To the above-named — and Mr. —, his solicitor [or, agent].

Notice of time and place of inspection.

[*Heading as above.*]

Take notice that you can inspect the documents mentioned in your Counter-notice notice of the — [add if necessary, except the deed numbered — in to inspect.

(s) If the documents are *title-deeds* or other *muniments of title*, the fact may be stated, but the above form must be used also, as there is no special privilege for them (*V. ante*, p. 33).

(t) This is the form given in *Minet v. Morgan*, L. R. 8 Ch. App. 361, 362, and approved of in *Corporation of Hastings v. Ivall*, *ib.* 1017; see also *Bewicke v. Graham*, 7 Q. B. D. 400.

(u) *Macfarlan v. Roll*, L. R. 14 Eq. 580.

(x) *Nias v. N. E. Ry.*, 3 Myl. & Cr. 355.

(y) *Southwark Water Co. v. Quick*, C. A. 3 Q. B. D. 315, 319.

(z) If the party appears in person, these words should be omitted.

Appendix. that notice] at my office (a) [or, at —] on — day next the — instant, between the hours of — and — o'clock, or that the — objects to giving you inspection of the documents mentioned in your notice of the — [or, of the document numbered — therein] on the ground that (b) [state ground of objection, and conclude as above].

Time.

Notice of objection to answers as insufficient.

Notice of
objection to
answers.

Take notice that the — objects to the answers numbered — to the interrogatories delivered by him herein as insufficient and requires and intends, if necessary, to apply at chambers for a further and better answer thereto.

Dated —.

To Mr. —

— solicitor,
or agent.

A. B.,
— solicitor,
or agent.

SUMMONSES.

To deliver interrogatories.

[Formal parts as usual.]

To deliver
interrogatories.

That the — may be at liberty [add if necessary, notwithstanding the time limited for doing so has expired] to deliver to the — or his solicitor [or, to the secretary or some other officer, or to a member of the — company] (c), interrogatories [or, further interrogatories] in writing for the examination of the —, or as to [state the particular points as to which the interrogatories are to be administered].

To set aside or strike out interrogatories.

To set aside
or strike out
interrogatories.

That the interrogatories delivered herein on the — for the examination of — may be set aside on the ground that they have been delivered unreasonably or vexatiously [or, without an order having been obtained for that purpose], or, that the interrogatory numbered — may be struck out on the ground that it is scandalous, and that the — may be ordered to pay the costs of this application.

For answer or further answer.

For answer.

That [if necessary, add, notwithstanding the objection raised by the — to answer] the — may be ordered within — day from the service of the order to be made hereon to make and file a full and suffi-

(a) The case of a party appearing in person is not provided for by the rules and forms relating to inspection. Possibly the place of his address for service (see Ord. XII. r. 8) would be also considered the proper place for inspection.

(b) *V. ante*, p. 124.

(c) *V. ante*, p. 160. The order may be for an answer by A. B. "or such other officer as is most conversant with the transaction in dispute in the action" (*Moline v. Tasm. Ry. Co.*, 32 L. T. 828).

cient affidavit in answer [or, further answer] to the interrogatories [or, **Appendix.** further interrogatories] exhibited herein for his examination on the part of the — on the — [or, under the order dated the —], or, to the questions numbered — to — both inclusive in the interrogatories, etc., and that the — may be ordered to pay the costs of this application (d).

For oral examination of party interrogated (e).

That the — may be ordered to attend before his Lordship, Mr. For oral Justice — or —, one of the Masters of this Court, or one of the examination Chief Clerks of —, or an Examiner of the Chancery Division of of party this Court to be by him examined *vidē voce* on oath on the interrogatories delivered to the — for his examination by the — [or, upon the interrogatories numbered — in further answer thereto] (f) the — having omitted to answer the said interrogatories [or, having answered them insufficiently], and that the said — may be ordered to pay the costs of such examination and of this application [add, if desired, and that the — may be ordered to produce upon such examination the following documents, viz: —, or, all documents admitted to be in his possession or power by his said answer (g)].

For an affidavit of Documents.

That the — may be ordered within — days (h) after service, &c., For affidavit to make and file a full and sufficient affidavit or affidavits, [or, to file a of documents. full and sufficient affidavit, &c., to be made by A. B., the Secretary of the said Company, or by the proper officer or as the case may be (i)]. or, that the — by his next friend may make and file, &c., stating what documents are or have been in his [or, their or either of their] possession or power relating to the matters in question in this action [or between him and the applicant or relating to his claim] (k); add, if desired, and that in the meantime all further proceedings herein may be stayed (l).

For further Affidavit of Documents.

That the — may be ordered within — days after service of the For further order to be made hereon to make and file a further more full and affidavit.

(d) For a form of summons to consider the sufficiency of an answer (see Ord. XXXI. r. 9), see 8 L. T. 198.

(e) For another form, see the order made in *Peyton v. Harting*, 29 L. T. Rep. 478.

(f) Or, "as to such points as he has refused or omitted to answer sufficiently" (see *Peyton v. Harting*, *supra*).

(g) See Consol. County Court Orders, 1875, Sched. Form No. 58, and 9 Ir. C. L. Rep. 297.

(h) *V. ante*, p. 107.

(i) *V. ante*, p. 163. The summons may either be in the ordinary form, leaving it to the Judge or Master to select and name the proper person to make the affidavit (see *Ranger v. G. W. R.*, 4 De G. & J. 74; *Rep. of Liberia v. Imp. Bank*, L. R. 16 Eq. 179), or the applicant may himself do so by the summons, or the summons may be general for an affidavit by "the proper officer" (see 8 Q. B. D. 143), or "by A. B. or other person who has cognisance of the Company's affairs" (see *Manch. Paving Co. v. Slagg*, xxvi. Sol. Journ. 599, 643). For a form of order for an affidavit by the officers of a foreign state, see L. R. 16 Eq. 181.

(k) *V. ante*, p. 19; other forms will be found in 1 De G. J. & S. 402 (e).

(l) *V. ante*, p. 110.

Appendix. sufficient affidavit stating whether he has or has had in his possession or power any and which of the following documents [*describing them*] or, any documents relating to the matters in question in this action not mentioned in his former affidavit of documents filed herein on the —, and accounting for the same, and that the said — may be ordered to pay the costs of this application (*m*).

For Inspection of Documents.

For inspection of documents. That the — may be ordered [*add, if necessary, notwithstanding the objection raised by him in the said affidavit to produce the same*] at all reasonable times upon reasonable notice to produce at the office of his solicitor, situate at — [*or, produce and leave with the clerk of records and writs*], the following documents, namely, — [*or, the documents specified in the schedule annexed to the affidavit filed in support of this application, and stated therein to be in his possession or power, or as the case may be*] and that the —, his solicitor and agents [*add, if desired, with the assistance of —, as his accountant, or as the case may be (n)*] may be at liberty to inspect and peruse the said documents so produced [*or, such thereof as the — does not object to produce*], and take copies and abstracts thereof and extracts therefrom [*add, if desired, and that in the meantime all further proceedings may be stayed (o)*].

For Inspection by a Special Agent.

By special agent. That the inspection by the —, their solicitors or agents directed by the order dated the — may be made by *A. B.*, of —, public accountant [*or as the case may be*], as the agent employed by the — or by some other professional accountant unconnected with the parties to this action (*p*).

For Inspection in an action on a policy of Marine Insurance.

In action on marine policy. [Formal parts as usual.] That the plaintiff [and all persons interested in this action and in the insurance the subject of this action, or as the case may be (*q*)], may be ordered to produce and show to the defendants their solicitor or agents upon oath all insurance slips, policies, letters of instruction, or other orders for effecting such slips or policies, or relating to the insurance or the subject matter of the

(*m*) See *Westminster, &c. Co. v. Clayton*, 3 N. R. 111, 112; *Willett v. Thistleton*, 1 *ib.* 42. As an alternative, a summons to *consider the sufficiency of the affidavit* might be taken out (see a form in 8 L. T. 198), upon which the question of production might be raised (see *Nicholl v. Jones*, 2 H. & M. 588).

(*n*) *V. ante*, p. 143. The names of any special agents should be inserted in the summons and order made thereon.

(*o*) See the statutory form of order *Ra. S. C.* April, 1880, Sched. H. 16, and the order made in *Ranger v. G. W. R.*, 4 De G. & J. 74, 77.

(*p*) See 7 Jur. N. S. 328.

(*q*) See *West of Engl. Bank v. Canton Ins. Co.*, 2 Q. B. D. 472; *China, &c. Co. v. Commercial, &c. Co.*, 8 *ib.* 142. Where the action is brought by the mortgagees of the ship not in possession, the mortgagors and their representatives may be ordered to give the discovery, and the owner may be ordered to do so when the action is brought by an agent on his behalf (*Fraser v. Burrows*, 2 *ib.* 624).

insurance on the ship — or the cargo on board thereof, or the freight thereby, and also all documents relating to the sailing or alleged loss of the said ship — the cargo on board thereof and the freight thereby, and all letters and correspondence with any person or persons in any manner relating to the effecting the insurance on the said ship, the cargo on board thereof, or the freight thereby, or any other insurance whatsoever effected on the said ship, or the cargo on board thereof, or the freight thereby on the voyage insured by, or relating to the policy sued upon in this action, or any other policy whatsoever effected on the said ship, or the cargo on board thereof, or the freight thereby on the same voyage. Also all correspondence between the captain or agent of the vessel and any other person, with the owner or any person or persons previous to the commencement of or during the voyage upon which the alleged loss happened. Also all protests, surveys, log books, charter-parties, tradesmen's bills for repairs, average statements, letters, invoices, bills of parcels, bills of lading, manifests, accounts, accounts-current, accounts-sales, bills of exchange, receipts, vouchers, books, documents, correspondence papers, and writings, (whether originals, duplicates, or copies respectively,) which now are in the custody, possession, or power, of the plaintiff, his brokers, solicitors, or agents, [or such persons interested] in any way relating or referring to the matters in question in this action, and that in like manner the plaintiff [and the said other persons as aforesaid] do account for all such documents as were once but are not now in his [or their or any of their] possession, custody, or power (r) [and that in the meantime, &c.].

Appendix.

To inspect Mines.

[*Formal parts as usual.*]

That the plaintiff, his workmen, and agents may be at liberty to descend into the defendant's colliery or mines at — in the affidavit of the — mentioned, and to view and inspect the workings so far as may be necessary to ascertain how far the defendant has worked into the plaintiff's mines, and the quantities gotten therefrom by him, with liberty to use the defendant's machinery for descending and ascending and of measuring, latching, and dialling the mine, and to make surveys and plans of the workings [*add, if necessary*, and for that purpose to remove the barriers erected between the mine of the plaintiff and the mine of the defendant], and take measurements and samples of the coal taken away from under the plaintiff's land (s).

For Inspection in action for Infringement of Patent.

That the plaintiffs, their solicitors, and agents [*or, witnesses*] may be at liberty to inspect the machines [*or as the case may be*] heretofore used by the defendant in the manufacture of —, and to put the said machines to work upon such inspection, and take samples of the — made or to be made upon the said machines [and photographs or draw-

(r) See 8 Q. B. D. 148.

(s) See the forms of order made in *Bennett v. Whitehouse*, 28 Beav. 119, and *Cooper v. Ince Hall Co.*, W. N. 1876, 240; see also the forms in 3 Bligh. O. S. 172, and 8 Ha. 97, 100.

Appendix. ings of the said machines] (t). or, that the defendant may be ordered to verify on affidavit the several kinds or classes of machines which he has sold or exposed for sale since —, and to produce one specimen of each kind or class of machines at — for inspection at all reasonable times by the plaintiff, his solicitors, and Messrs. — (u).

Inspection of process of manufacture with experiments and samples.

That the plaintiffs with their manager and a skilled witness may be at liberty at all reasonable times upon giving — days' notice to enter upon the business premises of the defendants, where the process of decorating or printing tin and metal plates is carried on by the defendants, and to examine and inspect the whole of the process by which such printed and decorated tin and metal plates are manufactured by the defendants; and to take, on paying for the same, samples of such plates; and upon and during such inspection to make such observations [and experiments] as may be necessary and expedient for the purpose of obtaining full information and evidence of the mode by which such plates are manufactured by the defendants (uu).

For further time for giving Discovery.

For further time to answer.

That the — may have — days further time from the date of the order to be made hereon to answer the interrogatories delivered for his examination by the [or as the case may be] (x), or, that the time limited by the order dated — for the — to make and file an affidavit in answer to the interrogatories delivered for his examination herein [or as the case may be] may be enlarged till the — day of —.

For leave to Seal up Irrelevant or Privileged Matter.

To seal up documents.

That the — may be at liberty to seal up such parts of the several documents disclosed in his affidavit of documents herein [or as the case may be] and thereby admitted to be in his possession or power as according to the affidavit made in support of this application do not relate to the matters in dispute in this action [or, are privileged from inspection] and to open and reseal the same when occasion may require (y).

To have Documents Unsealed.

To unseal documents.

That the — may be ordered within — days of the order to be made hereon to unseal and produce to the — the whole of the books, letters, and documents mentioned in his affidavit as having been sealed up by him, or such portions thereof as contain, etc. (z).

(t) See the order made in *Davenport v. Jepson*, 1 N. R. 307, and as to the affidavits required in support of such applications, 5 H. & N. 192.

(u) See the form of order in *Singer Co. v. Wilson*, 5 N. R. 505. For a form of summons for mutual inspection of works by both parties, see *Russell v. Cowley*, 1 Webst. 458.

(uu) *Flower v. Lloyd*, W. N. 1876, 169 (varied on appeal by directing inspection by scientific men to be agreed upon by the parties; *ib.* 230).

(x) See *Weston v. Coker*, 20 L. T. 299.

(y) This is necessary where the documents are in daily use (see the form of order in *John*. 739).

(z) See L. R. 7 Ch. App. 90.

For deposit of Documents in Court.

That the — may be ordered within — days from the service of **Appendix** the order to be made upon this application to produce and leave with the clerk of records and writs at the central office of the Supreme Court of Justice [or, at the office of the district registrar] the documents specified in the schedule annexed to the affidavit to be filed in support of this application [or as the case may be], and that the —, his solicitors, or agents be at liberty to inspect, &c., and that the clerk of records and writs [or, the district registrar] may produce the said documents upon any examination of witnesses in this action and at the hearing thereof as the applicant shall require (a).

To deposit documents in Court.

For production of Documents at the Party's Place of Business (b).

That the — may be at liberty to produce the documents scheduled Production at in his affidavit of documents filed herein the — [or as the case may be] place where or such of them as according to the affidavit (c) made by him in support documents of this application are required by him for his daily use in the conduct kept. of his business at his office situate at —, instead of at the office of his solicitor, as directed by the order dated the — (d).

For delivery out of Documents deposited in Court.

That the documents produced and left by the — with the For delivery clerk of records and writs [or, the district registrar], pursuant to out of docu- the order dated the — and specified in the affidavit of the —, filed ments. the —, may be delivered out to the — and to his solicitor or either of them.

Summons to expunge scandalous matter.

That the answers numbered — to —, both inclusive, contained To expunge in the affidavit of the — filed in answer to the interrogatories scandal. herein [or as the case may be], may be struck out as scandalous matter, and that the — may be ordered to pay the costs of this application.

To take answer off the file.

That the affidavit filed by the — on the — day of — last, in Taking answer the record and writ clerk's office, purporting to be the answer of the off file. — to the interrogatories delivered for his examination by the — may be taken off the file for irregularity [or as the case may be] (e), and that the — may be ordered to pay the costs of this application and also the costs occasioned to the — in consequence of the filing thereof (f).

(a) See *Blakesley v. Pegg*, 20 L. T. 57; *Groves v. G., Kay*, xix.

(b) *V. ante*, p. 140.

(c) The proper form of affidavit in such cases is that given in *Reid v. Langlois*, 1 Macn. & G. 627, 628 (see *per Wood*, V.-C., 2 J. & H. 608).

(d) See the form of order made in *Mertens v. Haigh*, Johns. 735, 739.

(e) See 2 De G. & Sm. 223.

(f) *V. ante*, p. 95.

To dismiss action or strike out defence for disobedience of order for discovery (g).

Appendix.
To dismiss
action or strike
out defence.

That this action may be dismissed with costs for want of prosecution [or, that the statement of defence herein may be struck out], the plaintiff [or, defendant] having failed to comply with the order of — made herein the — [recite direction given by order], and that the — may be ordered to pay the costs of this application.

Motion for writ of attachment (h).

[Heading as usual.]

For attach-
ment.

Take notice that this Honourable Court will be moved on — next, the — day of — at —, or so soon thereafter as counsel can be heard by Mr. — as counsel for the —, that the — may be at liberty to issue a writ of attachment against the — for his contempt of Court, in not [recite act directed to be done] pursuant to the order of —, dated the — [or, in not complying with the order, &c. whereby the — was directed to, &c.], and that the said — may be ordered to pay to the — his costs of and occasioned by the motion and the issuing and execution of the said writ of attachment.

Dated, &c. (i).

To Mr. — solicitor.
for the —.

X. Y., solicitor
for the —.

Affidavit in support of summons to interrogate (k).

[Formal heading as usual.]

Affidavit on
summons to
interrogate.

We A. B. of —, the above named —, and C. D. of —, the solicitor [or, agent] in this action for the said —, severally make oath and say as follows; and first I, the said A. B., for myself say:

1. That this action is brought for [state nature of action] (l).
2. That I am advised and believe that I shall derive material benefit in this action (m), from the discovery which I seek by the interrogatories desired to be administered herein; [add, if the application is made at an earlier stage of the action than usual (n), and that it is necessary and essential in order to enable me to frame my statement of claim herein, or to amend my statement of claim, or to give particulars of my cause of action, or defence herein, pursuant to an order dated the —, directing me to give such particulars, or as the case may be, that I should obtain such discovery at the present stage of the action; or if at a later stage than usual, give some explanation of the delay].

(g) See, as to how such an order can be enforced, *Cremetti v. Crom*, 4 Q. B. D. 225.

(h) A form of affidavit in support will be found in 14 C. B. N. S. 605.

(i) This form can easily be adapted to a summons for a writ of attachment.

(k) See, as to by whom the affidavit should be made, *ante*, p. 110, and Day's C. L. P. Acts (ed. 4), pp. 296, 309. Another form will be found in Consol. County Court Rules, Sched. Form. 57.

(l) This paragraph is only necessary where the application is made before pleadings have been delivered (see *Crookes v. Morrison*, 3 E. & B. 984).

(m) This statement is material (see *Oxlade v. N. E. Ry. Co.*, 12 C. B. N. S. 350).

(n) *V. ante*, pp. 14 seq.

3. That I am advised and believe that I have a good cause of action Appendix.
[or, defence] on the merits (o).

4. [Add, if made by a defendant, That this application is not made for the purpose of delay].

And I, the said C. D., say [repeat statements in paragraphs 2—4, *mutatis mutandis*].

Sworn, &c.

Filed, &c.

Affidavit in support of Summons to inspect (p).

[Formal heading as usual.]

I, —, of —, the above named —, make oath and say as follows: On summons to inspect.

1. This action is brought for [state briefly nature of action].

2. I am informed and believe that the — has in his possession or power the following documents, namely — [or, the documents set forth in the schedule hereto, or otherwise describing them].

3. [State circumstances shewing reasonable grounds for the belief that the documents are in his possession or power.]

4. That I am advised and believe that the whole of the said documents relate to the issues or matters in question in this action, and that I shall derive material benefit therein from the inspection of the said documents, and that it is material and necessary for me in order to support my claim [or, my defence] on the trial of this action [or, to enable me to frame my claim, or defence, or to give particulars of my claim, or defence, or as the case may be], to have inspection thereof (q).

5. [Add, if made by a defendant, That this inspection is not sought for the purpose of delay] (r).

RULES AND ORDERS.

Delivery of Interrogatories.

The plaintiff may, at the time of delivering his statement of claim, or at any subsequent time not later than the close of the pleadings, and a defendant may, at the time of delivering his defence, or at any subsequent time not later than the close of the pleadings, without any order for that purpose, and either party may, at any time, by leave of the Court or a Judge, deliver interrogatories in writing for the examination of the opposite party or parties, or any one or more of such parties, with a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose (Ord. XXXI., r. 1).

Form of Interrogatories.

Interrogatories may be in the Form No. 7 in Appendix (B.) hereto, with such variations as circumstances may require (ib. r. 3).

(o) The evidence of merits must be stated (*May v. Hawkins*, 11 Ex. 210), and where there are several plaintiffs or defendants whom it is desired to interrogate, this averment must be made as to all (*Doolin v. Dixon*, 16 W. R. 796).

(p) See Ord. XXXI. r. 18; ante, p. 129.

(q) *V. ante*, pp. 14 seq.

(r) See Consol. County Court Orders, 1875, Sched. Form 54.

*Interrogatories in Actions by or against Companies, etc.*Appendix.

If any party to an action be a body corporate or a joint stock company, whether incorporated or not, or any other body of persons, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply at chambers for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly (*ib.* r. 4).

Mode of objecting to Interrogatories.

Any objection to answering any one or more of several interrogatories on the ground that it or they is or are scandalous or irrelevant, or not put bona fide for the purposes of the action, or that the matters inquired into are not sufficiently material at that stage of the action, or on any other ground, may be taken in the affidavit in answer.

An application to set aside the interrogatories on the ground that they have been exhibited unreasonably or vexatiously, or to strike out any interrogatory or interrogatories on the ground that it or they is or are scandalous, may be made at chambers within four days after service of the interrogatories (R. S. C., Nov. 1878, r. 3, substituted for the original rs. 5 and 8).

Answers to Interrogatories.

Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as a Judge may allow (Ord. XXXI., r. 6).

Form of Answers.

An affidavit in answer to interrogatories shall, unless otherwise ordered by a Judge, if exceeding ten folios, be printed and may be in the Form No. 8 in Appendix (B.) hereto, with such variations as circumstances may require (*ib.* r. 7, as altered by R. S. C., June, 1876, r. 11).

Enforcing Answer or further Answer.

No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court or a Judge on motion or summons (*ib.* r. 9).

If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court or a Judge for an order requiring him to answer or to answer further as the case may be. And an order may be made requiring him to answer or answer further either by affidavit or by vivâ voce examination, as the Judge may direct (*ib.* r. 10).

Using Answers in Evidence.

Any party may, at the trial of an action or issue, use in evidence any one or more of the answers of the opposite party to interrogatories without putting in the others: Provided always, that in such case the Judge may look at the whole of the answers, and if he shall

be of opinion that any other of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in (*ib. r. 23*). Appendix.

Costs of Interrogatories and Answers.

The Court in adjusting the costs of the action shall at the instance of any party inquire or cause inquiry to be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing master or of the Court or Judge that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be borne by the party in fault (*ib. r. 2*).

Affidavit of Documents.

It shall be lawful for the Court or a Judge at any time during the pendency therein of any action or proceeding, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such action or proceeding, as the Court or Judge shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just (*ib. r. 11*).

Any party may, without filing any affidavit, apply to a Judge for an order directing any other party to the action to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question in the action (*ib. r. 12*).

Form of Affidavit.

The affidavit to be made by a party against whom such order as is mentioned in the last preceding Rule has been made, shall specify which, if any, of the documents therein mentioned he objects to produce, and it may be in the Form No. 9 in Appendix (B.) hereto, with such variations as circumstances may require (*ib. r. 13*).

Production of Documents referred to in Pleadings or Affidavits.

Every party to an action or other proceeding shall be entitled, at any time before or at the hearing thereof, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such action or proceeding, unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the action, or that he had some other sufficient cause for not complying with such notice (*ib. r. 14*).

Notice to any party to produce any documents referred to in his pleading or affidavits shall be in the Form No. 10 in Appendix (B.) hereto (*ib. r. 15*).

The party to whom such notice is given shall, within two days

Appendix. from the receipt of such notice, if all the documents therein referred to have been set forth by him in such affidavit as is mentioned in Rule 13, or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within four days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice may be in the Form No. 11, in Appendix (B.) hereto, with such variations as circumstances may require (*ib. r. 16*).

If the party served with notice under Rule 15 omits to give such notice of a time for inspection, or objects to give inspection, the party desiring it may apply to a Judge for an order for inspection (*ib. r. 17*).

Inspection of Documents.

Every application for an order for inspection of documents shall be to a Judge. And except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, such application shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party (*ib. r. 18*).

Postponing Discovery.

If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court or a Judge may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the action, or that for any other reason it is desirable that any issue or question in dispute in the action should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection (*ib. r. 19*).

Consequences of Failure to give Discovery.

If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court or a Judge for an order to that effect, and an order may be made accordingly (*ib. r. 20*).

Service of an order for discovery or inspection made against any party on his solicitor shall be sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may show in answer to the application that he has had no notice or knowledge of the order (*ib. r. 21*).

A solicitor upon whom an order against any party for discovery or

inspection is served under the last Rule, who neglects without reasonable excuse to give notice thereof to his client, shall be liable to attachment (*ib. r. 22*). Appendix.

Inspection of Property.

It shall be lawful for the Court or a Judge, upon the application of any party to an action, and upon such terms as may seem just, to make any order for the * * * inspection of any property, being the subject of such action, and for all or any of the purposes aforesaid to authorise any person or persons to enter upon or into any land or building in the possession of any party to such action, and for all or any of the purposes aforesaid to authorise any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence (Ord. LII., r. 3).

An application for an order under * * * Rules 2 or 3 of this Order may be made to the Court or a Judge by any party. If the application be by the plaintiff for * * * an order under the said Rules 2 or 3 of this Order it may be made after notice to the defendant at any time after the issue of the writ of summons, and if it be by any other party, then on notice to the plaintiff, and at any time after appearance by the party making the application (*ib. r. 4*).

Inspection in Patent Actions.

In any action in any of Her Majesty's superior courts of record at Westminster and in Dublin for the infringement of letters-patent, it shall be lawful for the Court in which such action is pending, if the Court be then sitting, or if the Court be not sitting then for a Judge of such Court, on the application of the plaintiff or defendant respectively, to make such order for an injunction, *inspection* or account, and to give such direction respecting such action, injunction, *inspection*, and account, and the proceedings therein respectively, as to such Court or Judge may seem fit (15 & 16 Vict. c. 83, s. 42).

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